

American Motorcyclist Association  
Association of Global Automakers  
Association of Marina Industries  
BoatUS  
International Snowmobile Manufacturers Association  
Motorcycle Industry Council  
National Boating Federation  
National Marine Manufacturers Association  
Outdoor Power Equipment Institute  
Personal Watercraft Industry Association  
Recreational Off-Highway Vehicle Association  
Specialty Vehicle Institute of America

March 23, 2011

The Honorable Lisa P. Jackson  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW Mail Code 1101A  
Washington, D.C. 20460

**Re: Petition for Rulemaking Under the Clean Air Act to Require the Continued Availability of Gasoline Blends of Less Than or Equal to 10% Ethanol**

Dear Administrator Jackson,

Pursuant to the Administrative Procedure Act (“APA”) and the Clean Air Act (“CAA”), manufacturers of motor-vehicles, boats, marine engines, motorcycles, and lawn and garden equipment, as well as organizations that represent the consumers that own and operate these products, hereby petition the Administrator of the United States Environmental Protection Agency (“EPA”) to promulgate a regulation requiring gasoline retailers to continue to make available gasoline blends of no greater than 10% ethanol (“≤E-10 fuel”). This affirmative marketing requirement is necessary to ensure that there will be no damage to (or impairment of) the emissions-related components on nonroad products and older model year motor vehicles – which were explicitly excluded from EPA’s “partial waivers” allowing the conditional use of blends up to fifteen percent ethanol (“E-15”) exclusively in newer model year motor vehicles.<sup>1</sup> EPA limited the scope of these waiver decisions because of the well-documented, emission-related problems that misfueling with E-15 could cause to at least all nonroad products and older

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<sup>1</sup> 75 Fed. Reg. 60894 (Nov. 4, 2010); 76 Fed. Reg. 4662 (Jan. 26, 2011)

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model year motor vehicles. EPA has clear authority to adopt such affirmative fuel marketing requirements under Section 211(c) of the Clean Air Act.

**I. There Will be a 100% Misfueling Rate of Nonroad Products and Older Model Year Motor Vehicles at Gasoline Stations that Only Offer E-15**

EPA has issued two partial waivers allowing the use of E-15 in 2007 and newer model year vehicles and 2001-2006 model year vehicles, respectively. However, EPA denied a waiver for several other categories of vehicles and equipment, including: nonroad engines, vehicles, boats, and equipment; 2000 and earlier model year motor vehicles; motorcycles; and heavy duty gasoline vehicles.<sup>2</sup> EPA denied a waiver for nonroad engines, vehicles, and equipment on the basis that “there are emission related concerns with the use of E-15 in nonroad products, particularly regarding long-term exhaust and evaporative emission (durability) impacts and materials compatibility issues.”<sup>3</sup> EPA made nearly identical statements with regard to model year 2000 and older motor vehicles and stated that such concerns also applied to heavy duty gasoline vehicles and engines and highway and off-highway motorcycles.<sup>4</sup>

The waivers covering 2001 and newer on-road motor vehicles included conditions requiring, among other things, mitigation of the potential for misfueling. In addition, EPA proposed a separate misfueling regulation that would supersede the misfueling waiver conditions when promulgated. There, EPA recognized its concerns with misfueling E-15 into nonroad products “include not only the potential for increased exhaust and evaporative emissions but also the potential for engine failures from overheating.”<sup>5</sup> However, despite EPA’s admission of the potential adverse environmental and economic consequences of misfueling, EPA’s misfueling proposal will not adequately ensure the continued protection of emissions control devices and air quality because it does nothing to ensure that the appropriate fuel is available for purchase for vehicles and equipment not subject to the waivers. Thus, if ≤E-10 fuels are not available (alongside grades up to E-15 at all gasoline stations choosing to provide fuels greater than E-10), consumers will have no choice but to misfuel with E-15.

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<sup>2</sup> Note that nonroad products means those nonroad products that contain spark-ignition engines and are used to power nonroad vehicles and equipment such as boats (including outboard marine engines, and Sterndrive Inboard Engines (SD/I)), Personal Watercraft (PWC), snowmobiles, generators, lawnmowers, forklifts, ATVs, nonroad motorcycles, lawnmowers, trimmers, chainsaws, and many similar products. *See* 75 Fed. Reg. at 68129-37.

<sup>3</sup> 75 Fed. Reg. at 68137

<sup>4</sup> *Id.* at 68129, 68138

<sup>5</sup> 75 Fed. Reg. 68044, 68046 (November 4, 2010)

Concerns over the availability of  $\leq$ E-10 fuel will increase as pre-2000 MY vehicles are replaced, as fuel use for the remaining categories of vehicles and equipment (not subject to a waiver) will constitute a small and declining percentage of the total fuel delivered by any fueling station. This concern is particularly acute given the stringent phase-in of the RFS program. The incentive for fueling stations to maintain a separate tank and pump for vehicles and equipment not subject to a waiver is minimal and would result in higher unit fuel costs to provide sufficient operating margin for the station to offer  $\leq$ E-10 fuel. Indeed, many stations may not even have enough tanks to accommodate an additional fuel, leading them to choose between E-15 and  $\leq$ E-10 fuels or to install additional tanks for  $\leq$ E-10 fuels and pass on those prices to consumers.<sup>6</sup> These additional costs would provide an additional disincentive for consumers to locate and utilize  $\leq$ E-10 fuel. If a retailer opts not to undergo these additional costs, it is reasonable for EPA to presume that a facility will elect to market only E-15, as E-15 is expected to be the cheaper fuel in the marketplace and gasoline retailing is highly price-sensitive.

There is also a strong potential that the reduced volume of  $\leq$ E-10 fuel required in the marketplace would result in elimination of supply, further eroding the availability of  $\leq$ E-10 fuel. This potential is heightened by the fact that the base fuel utilized for an E-15 blend would not be a legally viable fuel for blending and distribution with lower ethanol concentrations required for nonroad engines and equipment unless EPA also eliminates the 1% RVP waiver for current E-10 fuels as well.

## **II. EPA Has the Legal Authority to Ensure the Continued Availability of $\leq$ E-10 Fuel**

Petitioners urge EPA to adopt additional affirmative marketing requirements to mitigate misfueling to the greatest extent practicable. Under Section 211(c) of the CAA, the Administrator may promulgate controls, including affirmative fuel marketing requirements, “if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use...”<sup>7</sup> In addition, EPA also enjoys statutory authority to promulgate affirmative marketing requirements under another provision of Section 211(c), which permits the Administrator to control or prohibit fuels “if the emission product of such fuel or fuel additive causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>8</sup> In its proposed ethanol misfueling control regulations, EPA has already proposed to make the requisite findings related

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<sup>6</sup> See Flexible-Fuel Vehicle and Refueling Infrastructure Requirements Associated with Renewable Fuel Standard (RFS2) Implementation, Conducted for the Renewable Fuels Association (March 2011), available at [http://ethanolrfa.3cdn.net/dc3fb2d776734043df\\_13m6iiny.pdf](http://ethanolrfa.3cdn.net/dc3fb2d776734043df_13m6iiny.pdf)

<sup>7</sup> See CAA Section 211(c)(1)(B)

<sup>8</sup> See CAA Section 211(c)(1)(A)

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to “health and welfare” and “significant impairment” under both provisions of 211(c)(1) that would support an affirmative marketing requirement. Specifically, EPA concluded that:

Under Section 211(c)(1)(B), we believe that E15 would significantly impair the emission control systems used in MY2000 and older light-duty motor vehicles, heavyduty gasoline engines and vehicles, highway and off-highway motorcycles and all nonroad products... [and] that the likely result would be increased HC, CO, and NOx emissions when these particular engines, vehicles, and nonroad products use E15.<sup>9</sup>

Comments submitted into the dockets on the EPA E-15 partial waiver and the related proposed misfueling controls already include a large volume of specific information submitted by Petitioners that meets both of these statutory prongs. For example, attached please find comments submitted by the AllSAFE coalition, (which includes several of the Petitioners) in the E-15 partial waiver docket.<sup>10</sup> These enclosed comments (as well as the other related comments submitted by the Petitioners) demonstrate that misfueling with E-15 will cause a “substantial impairment of emission control devices” and will “degrade air quality” and thus endanger public health or welfare.

### **III. Regulatory and Judicial Precedent Supports EPA’s Adopting the Requested Affirmative Marketing Requirements**

Because EPA cannot predict with certainty that ≤E-10 fuel will be available for the legacy fleet, Petitioners request that EPA, consistent with prior precedent, promulgate an affirmative marketing requirement that ensures continued consumer choice and effectuates its E-15 waiver conditions and labeling requirements. EPA cannot reasonably rely on the assumption that market forces will ensure the continued availability of ≤E-10 fuel when it has approved a waiver based on conditions relating to misfueling. Rather, it must create legal obligations that ensure that the conditions on which the waivers were based will be fulfilled, and it must do so proactively before emission control devices, air quality, and public health are negatively impacted.

EPA has in the past appropriately used its CAA Section 211(c) authority to “control or prohibit” the sale or offering for sale of fuels to ensure the protection of emission control devices. Specifically, during the transition to unleaded fuels in the 1970s, EPA invoked its Section 211(c) authority to ensure that unleaded fuel was available to consumers in order to prevent the impairment of emission control devices. EPA’s prior experience with fuel transitions and misfueling demonstrates that labeling alone is insufficient to prevent misfueling. EPA’s

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<sup>9</sup> 75 Fed. Reg. 68044, 68081 (Nov. 4, 2010)

<sup>10</sup> See Exhibits A and A-1 (Docket # EPA-HQ-OAR-2009-0211-2559.1)

original unleaded fuel controls in 1974 included three essential components: (1) a warning label; (2) robust misfueling controls (i.e. restricted fuel nozzle diameters); and (3) *the required availability of unleaded fuels at a threshold number of gasoline stations.*<sup>11</sup>

In developing the misfueling control regulations for unleaded fuels, EPA correctly determined that “without regulatory action requiring retail outlets to market at least one grade of such gasoline, availability of that product to the general public in all areas of the country would be uncertain, and may not be sufficient to ensure the protection of catalytic control devices.”<sup>12</sup> In a series of rulemakings, EPA ultimately required that all urban gasoline retailers that sold more than 200,000 gallons per year and all rural gasoline stations that sold more than 150,000 gallons in any year after 1971 provide at least one pump for unleaded gasoline.<sup>13</sup> EPA maintained these affirmative marketing obligations throughout the phaseout of lead gasoline until it ultimately determined that availability of unleaded gasoline was so widespread as to make the requirements unnecessary.<sup>14</sup> Notably, when EPA ultimately eliminated the affirmative marketing requirement, it justified it on the basis that it was no longer necessary because more than 90% of purchased fuel was unleaded gasoline, thus creating a readily available commercial market for unleaded gasoline.

The D.C. Circuit upheld the affirmative marketing requirement, holding that the “the term ‘control’ encompasses the power to promote the availability of fuels needed for proper operation of emission control devices.”<sup>15</sup> The court reasoned that if unleaded gasoline were not conveniently available then the statutory intent of the Clean Air Act would be undermined because mandated emission controls would be damaged, resulting in the impairment of emission control devices.<sup>16</sup> The *Amoco* court further noted that given the enormous “stakes” of damage to emission controls through misfueling, EPA “need not gamble” that the free market would supply sufficient quantities of unleaded gasoline.<sup>17</sup>

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<sup>11</sup> See Exhibit B, Controls applicable to gasoline retailers and wholesale purchaser-consumers, 40 C.F.R. § 80.22 (1975)

<sup>12</sup> 38 Fed. Reg. 1254 (January 10, 1973)

<sup>13</sup> 37 Fed. Reg. 3882 (February 23, 1972); 38 Fed. Reg. 1254 (January 10, 1973); 38 Fed. Reg. 28301 (October 12, 1973); 39 Fed. Reg. 16123 (May 7, 1974); 39 Fed. Reg. 43281 (December 12, 1974)

<sup>14</sup> 56 Fed. Reg. 13767 (April 4, 1991)

<sup>15</sup> See *Amoco v. EPA*, 501 F.2d 722, 744 (D.C. Cir. 1974)

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 747

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EPA similarly need not gamble that  $\leq$ E-10 fuel will continue to be provided by market forces. Just as E-0 has rapidly been eliminated from the market in the face of RFS mandates and blending economics, there is a discernable threat that  $\leq$ E-10 fuel will soon become similarly scarce. Because nonroad products and older model year motor vehicles constitute only a fraction of total fuel use, these products would not provide economic justification for the marketing of  $\leq$ E-10 fuel. Rulemakings such as the one requested by petitioners require substantial lead time, and EPA must act proactively now to prevent potential problems. If EPA waits until  $\leq$ E-10 fuels become scarce in the market, it will be too late to commence a rulemaking to mitigate the misfueling that will surely result. Accordingly, Petitioners urge EPA to expeditiously promulgate an affirmative marketing requirement for  $\leq$ E-10 fuels.

#### **IV. Conclusion**

Based on the foregoing, Petitioners respectfully request that EPA promulgate an affirmative marketing requirement pursuant to CAA Section 211(c) that guarantees the availability of  $\leq$ E-10 fuel at any retail gasoline station that offers  $>$ E10 fuels.

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We look forward to working with EPA on the development and expeditious promulgation of this requested rulemaking. Please contact Kris Kiser at OPEI at (703) 549-7601 or Bill Guerry at (202) 342-8858 with any questions or requests for additional information.

Respectfully Submitted,

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