

The Assistant Administrator signed the following notice on April 15, 2009, and we are submitting it for publication in the Federal Register. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming Federal Register publication or on GPO's Web Site. Publication is expected on or about April 22, 2009. You can access the Federal Register at: www.gpoaccess.gov/fr/index.html. When using this site, note that text files may be incomplete because they do not include graphics. Instead, select Adobe Portable Document File (PDF) files.

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2009-0211; FRL -]

Notice of Receipt of a Clean Air Act Waiver Application to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Request for Comment

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice.

SUMMARY: On March 6, 2009, Growth Energy and 54 ethanol manufacturers submitted an application for a waiver of the prohibition of the introduction into commerce of certain fuels and fuel additives set forth in section 211(f) of the Clean Air Act ("the Act"). This application seeks a waiver for ethanol-gasoline blends of up to 15 percent by volume ethanol ("E15"). The statute directs the Administrator of EPA to grant or deny this application within 270 days of receipt by EPA, in this instance December 1, 2009. In this Notice, EPA is soliciting comment on all aspects of the waiver application, including whether a waiver is appropriate for ethanol-gasoline blends over 10 percent and less than 15 percent.

Dates: Written comments must be received on or before [insert 30 days after publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0211, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.

- E-mail: a-and-r-docket@epa.gov.
- Fax: (202) 566-1741.
- Mail: Air and Radiation Docket, Docket ID No. EPA-HQ-OAR-2009-0211, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2009-0211. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider

your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

How Can I Access the Docket?

EPA has established a public docket for this application under Docket ID No. EPA-HQ-OAR-2009-0211, which is available for online viewing at www.regulations.gov, or in person viewing at the EPA/DC Docket Center Public Reading Room, 1301 Constitution Avenue, NW., Room 3334, Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202-566-1744, and the telephone number for the Air and Radiation Docket is 202-566-1742.

Use www.regulations.gov to obtain a copy of the waiver request, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified in this document.

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343-9303; fax number: (202) 343-2802; email address: caldwell.jim@epa.gov.

SUPPLEMENTARY INFORMATION:

Statutory Background

Section 211(f)(1) of the Act makes it unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or to increase the concentration in use of, any fuel or

fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine under section 206 of the Act. EPA last issued an interpretive rule on the phrase “substantially similar” at 73 FR 22281 (April 25, 2008).

Section 211(f)(4) of the Act provides that upon application by any fuel or fuel additive manufacturer, the Administrator may waive the prohibitions of section 211(f)(1) if the Administrator determines that the applicant has established that such fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or a specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards to which it has been certified pursuant to sections 206 and 213(a) of the Act. In other words, the Administrator may grant a waiver for a prohibited fuel or fuel additive if the applicant can demonstrate that the new fuel or fuel additive will not cause or contribute to engines, vehicles or equipment failing to meet their emissions standards over their useful life. The statute requires that the Administrator shall take final action to grant or deny the application, after public notice and comment, within 270 days of receipt of the application.

The current statute reflects changes made under the Energy Independence and Security Act of 2007 which explicitly extended the section 211(f)(4) waiver provision to nonroad engines and nonroad vehicles, extended the period allowed for consideration of the waiver application from 180 days to 270 days and deleted a provision that resulted in a waiver becoming effective by operation of law if the Administrator made no decision within 180 days. The 1978 waiver for 10 percent ethanol in gasoline (“E10”) became effective under the previous provision when no

decision was made by the Administrator regarding the waiver application and the waiver became effective by operation of law after passage of 180 days.

Context of Growth Energy's Waiver Application

On March 6, 2009, Growth Energy and 54 ethanol manufacturers submitted a waiver application to the Administrator, pursuant to section 211(f)(4) of the Act, for ethanol-gasoline blends containing up to 15 percent ethanol by volume ("E15").

Growth Energy maintains that under the renewable fuel program requirements of the Energy Independence and Security Act of 2007, which is now primarily satisfied by the use of ethanol in motor vehicle gasoline, there exists a "blend barrier" or "blendwall" by which motor vehicle gasoline in the U.S. essentially will become saturated with ethanol at the 10 volume percent level very soon. Growth Energy maintains that a necessary first step is to increase the allowable amount of ethanol in motor vehicle gasoline up to 15 percent (E15) in order to delay the blendwall. They also claim other ways of delaying the blendwall could include adding more stations offering E85 blends and bringing in the renewable fuel mandate specified in the Energy Independence and Security Act of 2007. For its part, Growth Energy claims that the "blendwall" will make those renewable fuel mandates unreachable and that there are substantial environmental benefits associated with higher ethanol blends.

Growth Energy states in its waiver application that its supporting studies and extensive experience with ethanol support a conclusion that E15 will not cause or contribute to the failure of an emission control system such that the engine or vehicles fails to achieve compliance with its emission standards. In addition to the information that Growth Energy submitted, EPA is aware that several interested parties are investigating the impact that mid-level blends (e.g., E15 or E20) may have on vehicles and equipment. These testing programs are evaluating emissions

impacts as well as other types of impacts (i.e. catalyst, engine, and fuel system durability, and onboard diagnostics) on vehicles and equipment. The Department of Energy, working in conjunction with the Coordinating Research Council and other interested parties, is leading a substantial testing effort. Results from this program to date are referenced in Growth Energy's waiver request, and we expect additional data will be added to the docket as it becomes available.

One potential outcome at the end of our process, after reviewing the entire body of scientific and technical information available to us, may be an indication that a fuel up to E15 could meet the criteria for a waiver for some vehicles and engines but not for others. Some vehicles and engines may be more susceptible to emission increases or durability problems that cause or contribute to these vehicles or engines failing to meet their emissions standards. Assuming the criteria are met for a certain subset of vehicles, one interpretation of section 211(f)(4) is that the waiver could be approved in part for only that subset of vehicles or engines for which testing supports its use and for which adequate conditions or other measures could be implemented to ensure its proper use.

Another potential outcome is a conclusion that ethanol blends of greater than 10 percent, but less than 15 percent, warrant a waiver. To take such action, the Agency would need similar evidence, such as emissions durability testing, as what would be needed to address a waiver for a 15 percent blend.

Any approval, either fully or partially, is likely to elicit a market response to add E15 blends to E10 and E0 blends in the marketplace, rather than replace them. Thus consumers would merely have an additional choice of fuel.

Experience in past fuel programs has shown that even with consumer education and fuel implementation efforts, there sometimes continues to be public concern for new fuel requirements. Several examples include the phasedown of the amount of lead allowed in gasoline in the 1980s and the introduction of reformulated gasoline (RFG) in 1995. Some segments of the public were convinced that the new fuels caused vehicle problems or decreases in fuel economy. Although substantial test data proved otherwise, these concerns lingered in some cases for several years. As a direct result of these experiences, EPA wants to be assured that prior to granting a waiver, sufficient testing has been conducted to demonstrate the compatibility of a waiver fuel with engine, fuel and emission control system components.

EPA has previously granted waivers with certain restrictions or conditions, including requirements that precautions be taken to prevent using the waiver fuel as a base fuel for adding oxygenates, that certain corrosion inhibitors be utilized when producing the waiver fuel, and that waiver fuels meet voluntary consensus-based standards such as those developed by the American Society for Testing and Materials (ASTM). In a partial waiver for fueling certain types of vehicles or engines, the condition placed on the fuel manufacturer would be that the fuel is only used in certain vehicles or engines (i.e. E15 is only used in the subset of vehicles or engines identified in the partial or conditional waiver). EPA recognizes that there may be legal and practical limitations on what a fuel manufacturer may be required or able to do to ensure compliance with the conditions of the waiver, including preventing misfueling. EPA has not previously imposed this type of “downstream” condition on the fuel manufacturer as a condition for obtaining a section 211(f)(4) waiver. EPA does, however, have experience with compliance problems occurring when two types of gasoline have been available at service stations. Beginning in the mid-1970s with the introduction of unleaded gasoline and continuing into the

1980s as leaded gasoline was phased out, there was significant intentional misfueling by consumers. At the time most service stations had pumps dispensing both leaded and unleaded gasoline and a price differential as small as a few cents per gallon was enough to cause some consumers to misfuel.

Request for Comments

EPA invites public comments and data on all aspects of the waiver application that will assist the Administrator in determining whether the statutory basis for granting the waiver request for ethanol-gasoline blends containing up to E15 has been met. EPA specifically requests comment and data that will enable EPA to:

- (a) evaluate whether an appropriate level of scientific and technical information exists in order for the Administrator to determine whether the use of E15 will not cause or contribute to a failure of any emission control device or system over the useful life of any motor vehicle or motor vehicle engine (certified pursuant to section 206 of the Act) to achieve compliance with applicable emission standards;
- (b) evaluate whether an appropriate level of scientific and technical information exists in order for the Administrator to determine whether the use of E15 will not cause or contribute to a failure of any emission control device or system over the useful life of any nonroad vehicle or nonroad engine (certified pursuant to section 206 and 213(a) of the Act) to achieve compliance with applicable emission standards; and,
- (c) evaluate whether an appropriate level of scientific and technical information exists in order for the Administrator to grant a waiver for an ethanol-gasoline blend greater than 10 percent and less than or equal to 15 percent by volume.

EPA also requests comment on:

(d) all legal and technical aspects regarding the possibility that a waiver might be granted, in a conditional or partial manner, such that the use of up to E15 would be restricted to a subset of gasoline vehicles or engines that would be covered by the waiver, while other vehicles or engines would continue using fuels with blends no greater than E10. EPA seeks comment on what measures would be needed to ensure that the fuel covered by the waiver (i.e. a partial or conditional waiver) is only used in that subset of vehicles or engines. EPA acknowledges that the issue of misfueling would be challenging in a situation where a conditional waiver is granted. To the extent a partial or conditional waiver may be appropriate, please provide comments on the legal and technical need for restrictions of this nature. Comments are also requested on how the Agency might define a partial or conditional waiver. For example, assuming there is sufficient technical basis, should the subset of vehicles or engines that is allowed to use the waived fuel be defined by model year of production, engine size, application (e.g., highway vehicle vs. nonroad engine), or some other defining characteristic.

(e) Any education efforts that would be needed to inform the public about the new fuel that would be available if a waiver is granted. To address the possibility of a grant of a conditional or partial waiver, the Agency requests specific comments on public education measures that would be needed if the waiver allowed the fuel to be used only in a subset of existing vehicles or engines.

Commenters should include data or specific examples in support of their comments in order to aid the Administrator in determining whether to grant or deny the waiver request.

In order for any testing programs evaluating emissions impacts, as well as other types of impacts (i.e. catalyst, engine, and fuel system durability, and onboard diagnostics), to be the most

useful in EPA's evaluation of Growth Energy's waiver application, any mid-level ethanol blend testing or other analyses should consider emissions and other impacts for the different engines and equipment (including the fuel systems) that are currently in service and that could be exposed to mid-level ethanol blends. Such testing and analyses should also assess the long-term impacts of such blends. EPA specifically solicits the data and results from such testing and analyses.

Although it is not a specific criterion by which to evaluate a waiver request under section 211(f), any approved waiver request could require new program changes to accommodate this new fuel. EPA seeks comment on the effect of a potential waiver for ethanol blends above 10 percent and up to 15 percent on the existing fuel programs (e.g., gasoline detergent certification, impact on underground storage tanks, etc.) and on the gasoline production, distribution and marketing infrastructure. For example, EPA could need to modify its RFG and anti-dumping regulations to account for a higher blend. EPA also seeks comment on the dynamics of the blendwall concern raised by Growth Energy, the extent to which the use of an E15 waiver would in practice help address this concern, and what additional steps would have to be taken to bring E15 to market should a waiver be granted.

Dated:

Elizabeth Craig
Acting Assistant Administrator
Office of Air and Radiation