



November 23, 2011

TO: SIGMA

FROM: R. Timothy Columbus
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RE: EPA's Survey Requirements for Fuel Outlets Selling E15

Introduction

On July 25, 2011, the Environmental Protection Agency ("EPA" or the "Agency") issued a final rule (the "Rule" or "Regulation") establishing several measures to mitigate misfueling, *i.e.*, the potential for E15 to be used as fuel in vehicles, engines, and equipment for which E15 has not been approved. The Rule was issued in response to the Agency's partial waivers allowing for the introduction of E15 into commerce for use in model year ("MY") 2001 and newer light-duty motor vehicles. In addition to new requirements regarding labeling and information contained Product Transfer Documents, the Rule also institutes an ongoing implementation survey requirement to ensure that E15 is being properly blended and labeled. This memorandum provides additional details regarding this survey requirement.

Summary

Under recent EPA regulations, any gasoline producer/importer, ethanol producer/importer, and/or oxygenate blender involved in making, distributing, and/or selling E15 is responsible for conducting an ongoing survey of the implementation of the labeling, ethanol content, and RVP requirements for E15. These surveys will generally involve cost-sharing arrangements among obligated parties. Failure to abide by the survey obligations can lead to civil penalties of up to \$25,000 per day.

Overview of Survey Requirements

The surveys are intended to determine whether E15 is being properly blended and labeled. The Regulation provides two options to allow businesses involved in the survey to match the geographic scope of an ongoing survey to their business plans and to share the cost of the surveys among themselves as they see fit. The surveys are also required to collect Reid Vapor Pressure ("RVP") information for fuel samples labeled as E15 to help ensure that E15 is limited to 9.0 psi RVP in the summertime (as is required by law).

The survey requirements are analogous to EPA's past requirements that regulated parties conduct surveys in the Reformulated Gasoline ("RFG") and Ultra Low Sulfur Diesel ("ULSD")

programs. Although the case for surveys in the RFG, ULSD, and E15 contexts is not entirely the same, the common thread, EPA says, is that when regulated parties seek opportunities that may heighten the risk of emission increases, they should be responsible for taking steps to offset or minimize that risk.

Under the Rule, gasoline producers/importers, ethanol producers/importers, and/or oxygenate blenders involved in making, distributing, and selling E15 (“obligated parties”) are responsible for conducting an ongoing survey of the implementation of the labeling, ethanol content, and RVP requirements for E15. (Conversely, any party that chooses *not* to manufacture, market, and/or sell E15 does *not* need to comply with the survey requirements.) The purpose of the survey program is to help ensure that fuel pump labeling requirements are being met at retail stations or wholesale purchaser-consumer facilities, that the appropriate level of ethanol content is being properly blended and documented in fuel shipments, and that the RVP limitation is being met.¹ The survey is also intended to deter violations of the ethanol content, labeling, and RVP requirements.

In order to provide flexibility to those parties responsible for conducting the survey, the Rule contains two survey options: Survey Option 1 would allow an individual or group of obligated parties to conduct a local or regional survey *if their E15 business plans are limited in geographical scope*. Survey Option 2 would allow responsible parties to conduct a *nationwide survey*, which would likely become the most efficient option as businesses decide to sell E15 in more parts of the country.

The flexibility afforded by the two survey options accounts for the likelihood that E15 will gradually expand into the marketplace. Based on the history of and transition to E10, EPA expects E15 to initially begin in a relatively small number of retail stations in a few geographic areas. In that case, it may make sense for responsible parties to comply undertake Survey Option 1 to limit costs. If E15 expands beyond a few limited areas, Survey Option 2 may become more cost-effective. Thus, parties involved in selling E15 will be able to decide which survey option makes the most sense for their circumstances.

Below is a more detailed discussion of Survey Option 1 and Survey Option 2.

Survey Option 1

Survey Option 1 may be appropriate for parties that choose to manufacture, market, or sell E15 in limited areas, as Survey Option 1 facilitates the development of a relatively localized survey that may be more cost-effective than a national survey. Survey Option 1 includes survey requires (*e.g.*, sampling and testing methods) similar to those applicable to the national survey.

The number of samples for a survey conducted under Survey Option 1 can vary considerably depending on the size and scope of the individual survey plan. Since survey plans should use statistical means to determine the appropriate number of samples needed to comply

¹ Under the Clean Air Act and its implementing regulations, gasoline-ethanol blends that contain between 9 vol% and 10 vol% ethanol qualify for the 1.0 psi waiver of the applicable RVP standard. **EPA has determined that fuel blends such as E15 containing greater than 10 vol% ethanol do not qualify for this waiver.**

with the general survey requirements under the Regulation, EPA did not specify a minimum number of samples or percentage of stations to be sampled.

Importantly, prior to conducting a survey under Survey Option 1, a survey plan must be approved by EPA. (See below for a further discussion on the requirements survey program plans must meet in order to be approved by EPA.)

Survey Option 2

Survey Option 2 consists of a *nationwide* program of sampling and testing designed to provide oversight of *all* retail stations that sell gasoline. This option is likely to become the most efficient option as businesses decide to sell E15 in more parts of the country.

Details of the proposed survey requirements are similar to those included in the ULSD and RFG programs: Obligated parties must participate in a consortium that arranges to have an independent survey association conduct a statistically valid program of compliance survey pursuant to a survey plan (which must be approved by EPA). The survey organization is required to submit survey plans to EPA for approval on an annual basis. Additionally, proof that the amount of money necessary has been paid to the surveyor must also be submitted to EPA prior to the Agency approving the plan.

Survey Requirements

In order for a survey plan—under either Survey Option 1 or Survey Option 2—to be approved by EPA, they must generally meet the following requirements:

1. The survey program must be planned and conducted by a survey association that is independent of the obligated parties that arrange to have the survey conducted. This means that (a) representatives of the survey association are not employees of any obligated parties; (b) the survey association free from any obligation to or interest in any obligated parties; and (c) the obligated parties are free from any obligation to or interest in the survey association.
2. The survey program must be conducted at retail outlets that sell gasoline.
3. The independent survey association conducting the survey on behalf of the consortium must, among other things:
 - a. Submit to EPA for approval each calendar year a proposed survey plan that complies with the mathematical formula and other requirements applicable to Survey Option 1 and Survey Option 2, respectively.
 - b. Obtain gasoline samples offered for sale at retail outlets in accordance with the survey plan approved by EPA.
 - c. Test (or arrange to be tested) the samples for RVP and oxygenate content.

- d. In the case where a test yields a result that does not match the label affixed to the product (*e.g.*, a sample greater than 15.0 vol% ethanol from a dispenser labeled as “E15” or a sample greater than 10.0 vol% ethanol from a dispenser not labeled “E15”), or where a test yields an unlawful RVP, notify the retail outlet, refiner, or importer, as well as EPA.
 - e. Confirm that each fuel dispenser contains the appropriate label as required by law.
 - f. Provide EPA a quarterly and annual summary survey report.
 - g. Maintain all records relating to the surveys conducted.
 - h. Permit EPA to monitor the conducting of the surveys.
4. The survey plan must include four quarterly surveys each calendar year.
 5. The survey must by sampling requirements specified in the Rule, which vary depending on whether the plan is designed pursuant to Survey Option 1 or Survey Option 2.
 6. Keep the identification of the sampling areas included in any survey plan confidential from any regulated party, but *not* keep them confidential from EPA.
 7. Ensure that the probability that a retail outlet in the sampling area is selected for the survey is proportional to the volume of gasoline sold at the retail outlet relative to other outlets in the area.

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