



POLICY & ACTION FROM
CONSUMER REPORTS

Statement of

Shannon Baker-Branstetter

Policy Counsel

Consumers Union

Before the

Subcommittee on Environment and the Economy
of the House Energy and Commerce Committee

April 19, 2012

Chairmen Upton and Shimkus, Ranking Members Waxman and Green, and members of the Subcommittee, thank you for the opportunity to testify on the “Domestic Fuels Protection Act of 2012.” My name is Shannon Baker-Branstetter, and I serve as policy counsel for Consumers Union (CU), the public policy and advocacy arm of *Consumer Reports*®.¹ The Consumer Federation of America also supports and concurs in CU’s testimony.

Consumers Union believes that the “Domestic Fuels Protection Act of 2012” would unfairly burden consumers by shifting the risks of E15 entirely onto consumers. My testimony will highlight the risks consumers encounter when they use an ethanol blend above what their vehicle or equipment is designed to handle and suggest ways to reduce these risks.

I. BACKGROUND ON TRANSITION TO E15

On July 25, 2011, the Environmental Protection Agency (EPA) issued misfueling mitigation regulations to help upstream fuel providers, retailers, and consumers avoid fueling with E15 for vehicles and non-road engines for which E15 had not been approved. These regulations followed EPA’s 2010 decisions approving the use of E15 in vehicles model year (MY) 2001 and newer and denying the request for a waiver to introduce E15 into commerce for heavy-duty vehicles, non-road products, and MY 2000 and older light duty vehicles. EPA recognized that there were insufficient test data to show that these latter products could use E15 without exceeding emissions standards. It was EPA’s “engineering judgment that E15 would likely result in significant exceedances of emission standards by these products.”²

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² 76 Fed. Reg. 44412.

It is important to note that EPA's misfueling mitigation regulations are based solely on avoiding emissions impacts, not engine damage or problems related to durability or safety. While engine or other equipment damage can correlate with emissions, EPA did not assess product damage beyond the direct impact on emissions. EPA acknowledges that a variety of media are necessary to ensure consumers obtain accurate information at the point of sale when encountering E15 in order to avoid misfueling.³

II. IMPORTANCE OF CONSUMER PROTECTION IN TRANSITION TO E15⁴

With the small exception of flex fuel vehicle owners, the vast majority of consumers select gasoline based on two factors: price and grade. If consumers do fuel their vehicles with E10, they are often unaware of it. Many states do not require any labeling for ethanol blends up to E10, and blends change seasonally and with market conditions. If E15 is offered for sale, it changes the decision-making process for consumers, who will need to evaluate what product they are fueling, whether the blend makes economic sense, and whether they may invalidate a product warranty. If consumers want to avoid E15 for incompatibility, fuel economy, or other reasons, they need to know which pump to select. Without adequate displays, directions and public education, consumers are likely to misfuel by using E15 in older vehicles or outdoor power equipment. Misfueling can result in significant costs to consumers, including engine and other part replacement and paying for damage that would otherwise be covered by warranty.

³ 76 Fed. Reg. 44411.

⁴ It should be noted that the Domestic Fuels Protection Act of 2012 limits liability for damage caused by fuels or fuel additives approved by EPA after January 1, 2010. E15 is the obvious fuel to which this legislation applies, but fuels or fuel additives EPA approves in the future would also be subject to the same immunity under the broad language of the legislation.

A. E15 Will Damage Non-Road Engines in Outdoor Power Equipment

E15 is not approved for non-road engines, and indeed using E15 in non-road engines is likely to cause damage in many products, including snow blowers, lawnmowers, trimmers, leaf blowers, snowmobiles, boats, and other outdoor power equipment. Ethanol is an alcohol, and higher concentrations of ethanol in gasoline can lead to two kinds of failures. First, alcohol can corrode non-metal parts (such as hoses and gaskets), resulting in leakage and engine deterioration or failure. Second, alcohol attracts water particles, which leads the engine to burn hotter thereby risking overheating and failure. Leaving ethylated gasoline in the tank during off-season storage further aggravates the potential damage caused by the corrosive and hydrophilic properties of ethanol. Misfueling gasoline-powered products with ethanol blends has been the root cause of several major recalls of outdoor power equipment.⁵ Many marine engines and small non-road engines have encountered considerable problems with E10, let alone E15. There are more 160 million non-road products in the U.S.⁶ Using E15 in these products could result in enormous repair and replacement costs, as well as consumer frustration.

Today, if consumers want to purchase non-ethylated fuels, they must pay a premium. There is a niche (but growing) gasoline market for outdoor power equipment that charges \$6 to \$12 per quart (\$24-48/gallon) for gasoline or gasoline-oil mixtures that are specifically formulated for outdoor power equipment. Big box retailers created this market in response to damage that consumers have already experienced from using E10 from gas stations. The availability of E15 and the potential for misfueling may further drive up costs for consumers looking to protect their equipment.

⁵ See, e.g., Consumer Product Safety Commission recalls of Stihl yard power equipment: <http://www.cpsc.gov/cpscpub/prerel/prhtml11/11226.html>, and Toro snow blowers: <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10299.html>.

⁶ See 75 Fed. Reg. 68076.

B. Consumers Are Not Aware that E15 is Not Approved for MY 2000 and Earlier Vehicles

EPA did not approve E15 for use in light-duty vehicles that are model year 2000 or earlier because these engines and emission control systems cannot handle the higher ethanol blend. However, consumers are not used to selecting gasoline based on the age of their vehicle, and this will be a learning process. During the transitions to unleaded gasoline and ultra low sulfur diesel, consumers were made aware of the fuel restrictions on new vehicles at the point of the sale of the vehicle, and the fuel dispensers for leaded gas were incompatible with new cars. The situation is quite different today with E15, which is a new fuel that is incompatible with older vehicles. There are tens of millions of vehicles on the road that are MY 2000 or earlier. In many regions and communities, older cars make up the majority of the vehicle distribution. If they decide to sell E15, local retailers and fuel providers are likely to know if a large number of vehicles they service fall into the unapproved categories and should make an extra effort to inform consumers of the risks to their vehicles. Public outreach and labeling are important steps in helping consumers understand the risks of E15. However, E15 retailers and fuel providers should also bear responsibility for assuring the quality of a new product they choose to sell to consumers and warning consumers of potential damage from the product.

C. By Fueling with E15, Consumers May Inadvertently Void Vehicle Warranties

EPA's approval of E15 for use in vehicles MY 2001 and later is based on its finding that E15 is unlikely to damage the emission-related equipment for these vehicles. However, automakers have repeatedly argued that using fuels for which a vehicle was not designed can lead to drivability, performance and materials compatibility problems that may pose safety risks. Other than flex-fuel vehicles (FFVs), automakers have included provisions in owner manuals and

warranties that damage from ethanol blends greater than 10 percent may not be covered. If fuel providers and automakers are shielded from any liability from any damage from E15, consumers will likely be left responsible for any damage caused by E15.

III. CONCERNS WITH LEGISLATION SHIFTING BURDEN TO CONSUMERS

A. EPA's approval of E15 or other fuels is based solely on emissions impacts

The Domestic Fuels Protection Act of 2012 uses EPA's waiver authority under the Clean Air Act as a shield against consumer product liability, which would leave consumers solely responsible for damage caused by E15. EPA's approval of a fuel or fuel additive has little to no bearing on whether the fuel will damage consumer products, and EPA is in no position to determine the scope of a fuel's effect on consumer products outside the emissions context. State consumer protection law is still essential to prevent negligent or reckless actions surrounding marketing and selling E15 that could cause damage to consumers' vehicles and equipment.

EPA's authority under the Clean Air Act to deny or approve the introduction of a fuel or fuel additive into commerce is based on its determination of whether the fuel or fuel additive would contribute to air pollution that may reasonably be anticipated to endanger human health. EPA's approval of a fuel or fuel additive does not imply that, as a product, the fuel or fuel additive is will not pose other risks for consumer products. Immunizing fuel providers on the one hand and vehicle and equipment manufacturers on the other, leaves consumers squeezed in the middle. Blanket immunity for all other parties leaves consumers without recourse if E15 (or other approved fuels or fuel additives) damage consumer vehicles or equipment.

B. EPA's misfueling mitigation regulations are not designed to avoid product damage and does not address product liability

During the comment period for EPA's misfueling mitigation regulations, nearly all stakeholders agreed that EPA's proposed labeling measures were inadequate to prevent misfueling. Gasoline retailers, petroleum producers and marketers, and associations representing automakers, outdoor power equipment and marine engines all stated unequivocally in their comments in last year's rulemaking that despite the EPA label, consumers will misfuel and the resulting damage could be significant. However, the proposed legislation, rather than trying to solve the problem of preventing damage from E15 and easing its transition into the marketplace, would simply sweep aside all liability from E15 for everyone but the consumer. Fuel providers and product manufacturers argue that they would not sell it or honor warranties for products that use it if they were held accountable for any of the resulting damage. Consumers Union remains concerned about unleashing E15 on a retail market that is technologically unprepared and holding consumers responsible for damages to their cars and outdoor power equipment.

Assigning liability is a method of allocating responsibility and motivating actors to take reasonable precautions to prevent harm. By choosing to sell a product about which consumer confusion is predictable, retailers should take responsibility for informing consumers of the limitations of the product. EPA's efforts to require labeling of E15 at gasoline fuel dispensers and surveys to check for compliance are helpful and common sense measures, but it remains to be seen if this will be sufficient to minimize misfueling. It is Consumers Union's belief that it will take more than a label to teach consumers how to recognize distinctions among ethanol blends and select the appropriate fuel.

Consumers Union does not want to encourage lawsuits, but we do want to encourage responsible retailer behavior in marketing and informing consumers about E15. We hope shared

responsibility will actually stave off lawsuits. Some level of misfueling is inevitable, but retailers should do all they can to minimize it to the level of individual mishaps, instead of an avoidable pattern. All parties recognize the risks from selling a new fuel that is incompatible with many existing vehicles and equipment, but this risk should not be born solely by consumers. By sharing responsibility for informing consumers, retailers will be motivated to minimize consumer confusion and help consumers select the proper fuel.

IV. PROPOSED SOLUTIONS

A. Fuel providers can and should take additional steps beyond the EPA misfueling mitigation regulations.

Labeling is useful and cost-effective, but it is not sufficient for preventing misfueling by consumers with resulting damage to older vehicles and non-road engines. In its final misfueling mitigation rule, EPA notes that “fuel providers may post supplemental labels or signs that they believe would be useful for informing their customers.”⁷ EPA also notes in its final rule that it recommends public education and outreach, although it does not specify what this must entail. It notes, “businesses interact with consumers (via advertising, a Web site, pamphlets, etc.) about the fuels they sell, and those that decide to sell E15 will need to make decisions about how to promote E15 in a manner that also minimizes misfueling.”⁸ EPA further suggests that, “Fuel providers are encouraged to consider whether their particular circumstances would make it useful to take additional, tailored steps to avoid consumer misfueling.”⁹ Stakeholders also recognize that more can be done. For example, the American Petroleum Institute, in its report and analysis of potential mitigation measures noted that even its list of eighteen potential measures should not

⁷ 76 Fed. Reg. 44415.

⁸ 76 Fed. Reg. 44424.

⁹ 76 Fed. Reg. 44426.

be considered exhaustive, and “there may be other effective approaches that should also be considered.”¹⁰

Retailers are in the best position to provide tailored warnings, labeling, or other forms of education to consumers to prevent misfueling at the point of sale. Removing liability beyond posting the EPA label will decrease the motivation for adopting such techniques. Retailers know their clientele best and can proactively help them avoid engine damage.

B. Consumers Union Recommends Tailored, Proactive Solutions.

Consumers Union has several suggestions that may help reduce misfueling, and we want to encourage retailers to adopt local solutions. First, for customers paying with a credit or debit card, retailers could program the keypad on the dispenser to prompt consumers to confirm that they are fueling a product for which E15 has been approved, just as they are prompted to enter their zip code or opt for a car wash. For customers paying cash inside the store, retailers could train attendants to ask customers a comparable question. Similarly, stations could encourage attendants to personally educate customers while parked at the fueling islands in the first several months that E15 is offered.

Second, bright colors and pictorial diagrams that differentiate the fuel could be helpful in drawing attention the distinction and restrictions on E15. While fuel providers would need to be sensitive to information overload, icons depicting equipment for which E15 is not approved, but are common in that particular station or neighborhood could be useful in stemming foreseeable misfueling patterns. Third, for retailers that see significant boat or portable fuel-can traffic, they

¹⁰ “Evaluation of Measures to Mitigate Misfueling of Mid- to High-Ethanol Blend Fuels at Fuel Dispensing Facilities” from American Petroleum Institute at 1. Available at: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0448-0002>. Potential mitigation measures included refueling attendants, restricted credit/debit cards, RFID options, enhanced dispenser visual displays and public education programs.

should consider offering a separate, non-vehicle dispenser that would direct such customers to E0-E10. There are numerous other signage, outreach, and station configuration options that would behoove fuel providers, retailers and marketers in serving their customers and avoiding misfueling, but if they have immunity from the outset, they will be unlikely to maximize such measures.

V. CONCLUSION

In summary, E15 retailers, fuel providers, marketers, state and federal regulatory agencies, and consumer protection offices should work together to inform consumers of allowable uses, as well as the risks, of E15. E15 is not a match for many products consumers currently fuel with E10, and this will be a learning process for consumers and retailers. There are significant risks and costs associated with misfueling, and it is unfair to shift the burden of any and all damage that results from E15 onto the consumer. We thank the Committee for the opportunity to present our views and recommendations. I am happy to answer any questions.