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H.R. 4345, THE DOMESTIC FUELS PROTECTION ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

APRIL 19, 2012

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H.R. 4345, THE DOMESTIC FUELS PROTECTION ACT OF 2012

THURSDAY, APRIL 19, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in Room 2322, Rayburn House Office Building, Hon. John Shimkus, [chairman of the subcommittee] presiding.

Present: Representatives Shimkus, Murphy, Whitfield, Pitts, Latta, Harper, Cassidy, Barton, Upton (ex officio), Green, Barrow, Capps and Waxman (ex officio).

Staff Present: Charlotte Baker, Press Secretary; Michael Beckerman, Deputy Staff Director; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Maryam Brown, Chief Counsel, Energy and Power; Jerry Couri, Professional Staff Member, Environment; Cory Hicks, Policy Coordinator, Energy and Power; Ben Lieberman, Counsel, Energy and Power; David McCarthy, Chief Counsel, Environment and Economy; Chris Sarley, Policy Coordinator, Environment and Economy; Michael Aylward, Democratic Professional Staff Member; Jacqueline Cohen, Democratic Counsel; Greg Dotson, Democratic Energy and Environment Staff Director; Caitlin Haberman, Democratic Policy Analyst; and Alexandra Teitz, Democratic Senior Counsel, Environment and Energy.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. It is 9:30 by that clock, a few minutes after because of mine, and we want to open the hearing and welcome our members of our panel, first and only panel.

Before I do that, I want to take a point of personal privilege on behalf of my colleague Mr. Bass, who sends his regrets that he wasn't able to be here. He serves on the subcommittee. As our panelist from the State of New Hampshire knows, that there was a tragedy and loss of a chief of police in Greenland, New Hampshire. He was killed in the line of duty last Friday, so much of the New Hampshire delegation is up there with a lot of State and local officials today, and that is why Mr. Bass cannot attend. And as a member of the subcommittee, he is a very active member.

So with that I would just like to pause for a moment of silence in remembering the law enforcement community, and the chief of police Michael Maloney and his family, and the entire State of New Hampshire.

Thank you. And now I would recognize myself for 5 minutes for an opening statement.

Today the subcommittee will hold a hearing on H.R. 4345, the Domestic Fuels Protection Act of 2012. I am proud to once again be a lead sponsor of this bipartisan legislation, with my colleague on the committee Mr. Ross.

[H.R. 4345 follows:]

I

112TH CONGRESS
2D SESSION

H. R. 4345

To provide liability protection for claims based on the design, manufacture, sale, offer for sale, introduction into commerce, or use of certain fuels and fuel additives, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 2012

Mr. SHIMKUS (for himself, Mr. ROSS of Arkansas, Mr. SULLIVAN, and Mr. PETERSON) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide liability protection for claims based on the design, manufacture, sale, offer for sale, introduction into commerce, or use of certain fuels and fuel additives, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Domestic Fuels Protection Act of 2012".

SEC. 2. FUEL COMPATIBILITY.

(a) COMPATIBILITY.—Subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) is amended—

(1) by redesignating section 9014 as section 9015; and

(2) by inserting after section 9013 the following:

"SEC. 9014. COMPATIBILITY.

"(a) DEFINITIONS.—In this section:

"(1) ASSOCIATED DISPENSING EQUIPMENT.—The term 'associated dispensing equipment' means equipment, at a stationary facility, that is—

"(A) used for the storage and dispensing of any fuel or fuel additive described in subsection (b)(3)(A) and that dispenses the fuel or fuel additive into any fuel tank of any motor vehicle, motor vehicle engine, nonroad vehicle, nonroad engine, or nonroad equipment; and

"(B) subject to regulation under sections 1910.106 and 1926.152 of title 29, Code of Federal Regulations (as in effect on the date of enactment of the Domestic Fuels Protection Act of 2012).

"(2) COMPATIBLE.—The term 'compatible' has the meaning given the term in section 280.12 of title 40, Code of Federal Regulations (as in effect on the

date of enactment of the Domestic Fuels Protection Act of 2012).

"(3) MOTOR VEHICLE.—The term 'motor vehicle' has the meaning given the term in section 216 of the Clean Air Act (42 U.S.C. 7550).

"(4) MOTOR VEHICLE ENGINE.—The term 'motor vehicle engine' means an engine in a motor vehicle.

"(5) NONROAD ENGINE.—The term 'nonroad engine' has the meaning given the term in section 216 of the Clean Air Act (42 U.S.C. 7550).

"(6) NONROAD EQUIPMENT.—The term 'nonroad equipment' means any recreational, construction, industrial, agricultural, logging, residential, commercial lawn and garden, or other equipment that is powered by a nonroad engine.

"(7) NONROAD VEHICLE.—The term 'nonroad vehicle' has the meaning given the term in section 216 of the Clean Air Act (42 U.S.C. 7550).

"(8) PROVIDER OF FINANCIAL ASSURANCE.—The term 'provider of financial assurance' has the meaning given the term in section 280.92 of title 40, Code of Federal Regulations (as in effect on the date of enactment of the Domestic Fuels Protection Act of 2012).

"(9) UNDERGROUND STORAGE TANK SYSTEM.—The term 'underground storage tank system' means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

"(b) COMPATIBILITY WITH FUELS.—

"(1) LIABILITY.—No person shall be liable under any Federal, State, or local law (including common law) because an underground storage tank, underground storage tank system, or associated dispensing equipment is not compatible with a fuel or fuel additive described in paragraph (3)(A) if the tank, system, or equipment has been determined to be compatible with the fuel or fuel additive under the guidelines or regulations described in paragraph (3).

"(2) FINANCIAL ASSURANCE.—A provider of financial assurance shall not deny payment for any claim on the basis that an underground storage tank, underground storage tank system, or associated dispensing equipment is not compatible with a fuel or fuel additive described in paragraph (3)(A) if the tank, system, or equipment has been determined to be compatible with the fuel or fuel additive under

1 the guidelines or regulations described in paragraph
2 (3).
3 "(3) GUIDELINES AND REGULATIONS.—
4 "(A) IN GENERAL.—Paragraphs (1) and
5 (2) apply to any underground storage tank, un-
6 derground storage tank system, and associated
7 dispensing equipment that meets any guidelines
8 or regulations, which may be revised under sub-
9 paragraph (B), issued by the Administrator and
10 in effect on the date of enactment of the Do-
11 mestic Fuels Protection Act of 2012, address-
12 ing compatibility of such tanks, systems, or
13 equipment with any fuel or fuel additive that is
14 authorized and registered, or for which an up-
15 dated registration is accepted, by the Adminis-
16 trator or under any Federal law, for use in a
17 motor vehicle, motor vehicle engine, nonroad ve-
18 hicle, nonroad engine, or nonroad equipment.
19 "(B) REGULATIONS.—
20 "(i) IN GENERAL.—Not later than 1
21 year after the date of enactment of the Do-
22 mestic Fuels Protection Act of 2012, the
23 Administrator shall issue, or if applicable
24 revise, regulations setting standards for de-
25 termining whether an underground storage

1 tank, underground storage tank system, or
2 associated dispensing equipment is compat-
3 ible with a fuel or fuel additive described
4 in subparagraph (A).
5 "(ii) MINIMUM STANDARDS.—The
6 regulations issued under clause (i) shall in-
7 clude minimum standards and processes
8 for certification by the Administrator or by
9 an owner, operator, or manufacturer of un-
10 derground storage tanks, underground
11 storage tank systems, or associated dis-
12 pensing equipment, to ensure compat-
13 ibility.
14 "(4) UNDERGROUND STORAGE TANKS, UNDER-
15 GROUND STORAGE TANK SYSTEMS, AND ASSOCIATED
16 DISPENSING EQUIPMENT PREVIOUSLY LISTED AS
17 COMPATIBLE.—Any underground storage tank, un-
18 derground storage tank system, or associated dis-
19 pensing equipment that, on or before the date of en-
20 actment of the Domestic Fuels Protection Act of
21 2012, is listed by a nationally recognized testing lab-
22 oratory as compatible with a fuel or fuel additive de-
23 scribed in paragraph (3)(A) shall be deemed compat-
24 ible with such fuel or fuel additive under the regula-
25 tions issued under this subsection.

"(5) ADMINISTRATION.—Nothing in this section affects—

"(A) the introduction into commerce, offering for sale, or sale of any fuel or fuel additive; or

"(B) any applicable requirement, including any requirement under section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)).".

(b) CONFORMING AMENDMENTS.—The Solid Waste Disposal Act is amended—

(1) in section 9003(h)(12)(A) (42 U.S.C. 6991b(h)(12)(A)), by striking "section 9014(2)(B)" and inserting "section 9015(2)(B)";

(2) in section 9004(f)(1)(A) (42 U.S.C. 6991c(f)(1)(A)), by striking "section 9014(2)(A)" and inserting "section 9015(2)(A)"; and

(3) in section 9011 (42 U.S.C. 6991j), by striking "section 9014(2)(D)" and inserting "section 9015(2)(D)".

(c) TABLE OF CONTENTS.—The table of contents contained in section 1001 of the Solid Waste Disposal Act (42 U.S.C. 6901) is amended by striking the item relating to section 9014 and inserting the following:

"Sec. 9014. Compatibility.
"Sec. 9015. Authorization of Appropriations.".

1 **SEC. 3. MISFUELING.**

2 (a) IN GENERAL.—Section 211(g) of the Clean Air
3 Act (42 U.S.C. 7545(g)) is amended by adding at the end
4 the following:

5 "(3) LIMITATION ON LIABILITY.—

6 "(A) LIMITATION.—

7 "(i) IN GENERAL.—Except as provided in
8 clause (ii), no person shall be liable under any
9 provision of this Act or any Federal, State, or
10 local law, including common law, if—

11 "(I) a self-service purchaser intro-
12 duces any transportation fuel into any
13 motor vehicle, motor vehicle engine,
14 nonroad vehicle, or nonroad equipment for
15 which the fuel has not been approved
16 under subsection (f); or

17 "(II) the introduction of any transpor-
18 tation fuel voids the warranty of the manu-
19 facturer of the motor vehicle, motor vehicle
20 engine, nonroad engine, nonroad vehicle, or
21 nonroad equipment.

22 "(ii) EXCEPTION.—Clause (i) shall not
23 apply to—

24 "(I) a person who sells any transpor-
25 tation fuel and does not comply with the
26 misfueling regulations adopted by the Ad-

ministrator under section 80.1501 of title 40, Code of Federal Regulations (or successor regulations); or

"(II) a person who intentionally misfuels.

"(B) DEFINITIONS.—In this paragraph:

"(i) NONROAD EQUIPMENT.—The term 'nonroad equipment' means any recreational, construction, industrial, agricultural, logging, residential, commercial lawn and garden, or other equipment that is powered by a nonroad engine.

"(ii) TRANSPORTATION FUEL.—The term 'transportation fuel' means any fuel that contains fuel or a fuel additive that is authorized after January 1, 2010, by the Administrator or under any Federal law, for use in any motor vehicle, motor vehicle engine, nonroad vehicle, nonroad engine, or nonroad equipment.".

(b) PENALTIES.—Section 211(d) of the Clean Air Act (42 U.S.C. 7545(d)) is amended—

(1) in paragraph (1), in the first sentence, by inserting "(g)," after "or the regulations prescribed under subsection (c),"; and

1 (2) in paragraph (2), in the first sentence, by
2 inserting "(g)," after "of the regulations prescribed
3 under subsections (c),".

4 **SEC. 4. LIMITATION ON LIABILITY.**

5 (a) QUALIFIED CIVIL LIABILITY ACTIONS IN FED-
6 ERAL COURT AND STATE COURT.—

7 (1) IN GENERAL.—No qualified civil liability ac-
8 tion shall be filed or maintained in any court of the
9 United States or any State court.

10 (2) DISMISSAL OF PENDING ACTIONS.—Any
11 qualified civil liability action filed or pending in any
12 court of the United States or any State court on or
13 after the date of enactment of this Act shall be dis-
14 missed with prejudice.

15 (b) SAFE HARBOR.—Notwithstanding any Federal,
16 State, or local law (including common law), no qualified
17 product shall be considered to be a defective product, if
18 the qualified product does not violate a control or prohibi-
19 tion, respecting any characteristic or component of the
20 qualified product, imposed by the Administrator of the
21 Environmental Protection Agency under section 211 of
22 the Clean Air Act (42 U.S.C. 7545).

23 (c) DEFINITIONS.—In this section:

1 (1) COVERED ENTITY.—The term "covered en-
2 tity" means any entity engaged in the design, manu-
3 facture, sale, or distribution of any—
4 (A) qualified product; or
5 (B) motor vehicle, motor vehicle engine,
6 nonroad vehicle, nonroad engine, or nonroad
7 equipment.
8 (2) MOTOR VEHICLE.—The term "motor vehi-
9 cle" has the meaning given the term in section 216
10 of the Clean Air Act (42 U.S.C. 7550).
11 (3) MOTOR VEHICLE ENGINE.—The term
12 "motor vehicle engine" means an engine in a motor
13 vehicle.
14 (4) NONROAD ENGINE.—The term "nonroad
15 engine" has the meaning given the term in section
16 216 of the Clean Air Act (42 U.S.C. 7550).
17 (5) NONROAD EQUIPMENT.—The term
18 "nonroad equipment" means any recreational, con-
19 struction, industrial, agricultural, logging, residen-
20 tial, commercial lawn and garden, or other equip-
21 ment that incorporates a nonroad engine.
22 (6) NONROAD VEHICLE.—The term "nonroad
23 vehicle" has the meaning given the term in section
24 216 of the Clean Air Act (42 U.S.C. 7550).

1 (7) PERSON.—The term "person" has the
2 meaning given the term in section 1 of title 1,
3 United States Code, except that the term includes
4 any governmental entity.
5 (8) QUALIFIED CIVIL LIABILITY ACTION.—The
6 term "qualified civil liability action" means any civil
7 action or proceeding brought by any person against
8 a covered entity for damages, punitive damages, in-
9 junctive or declaratory relief, abatement, restitution,
10 fines, penalties, or other relief, resulting from the in-
11 troduction of any qualified product into any motor
12 vehicle, motor vehicle engine, nonroad vehicle,
13 nonroad engine, or nonroad equipment.
14 (9) QUALIFIED PRODUCT.—The term "qualified
15 product" means—
16 (A) any fuel or fuel additive for which a
17 registration is in effect under section 211(b) of
18 the Clean Air Act (42 U.S.C. 7545(b)) or any
19 other Federal law enacted on or after October
20 13, 2010;
21 (B) a transportation fuel or transportation
22 fuel additive that—
23 (i) contains any renewable fuel (as de-
24 fined in section 211(o)(1) of the Clean Air
25 Act (42 U.S.C. 7545(o)(1))); and

1 (ii) is designated for introduction into
2 interstate commerce by the Administrator
3 of the Environmental Protection Agency or
4 the Secretary of Energy under the Clean
5 Air Act (42 U.S.C. 7401 et seq.), the En-
6 ergy Policy Act of 1992 (42 U.S.C. 13201
7 et seq.), or any other Federal law enacted
8 on or after October 13, 2010;
9 (C) any component of a fuel or fuel addi-
10 tive described in subparagraph (A) or (B); or
11 (D) any blend stock.
12 (10) STATE.—The term "State" means each of
13 the several States of the United States; the District
14 of Columbia; and any territory, commonwealth, or
15 possession of the United States.

○

Mr. SHIMKUS. This Congress I am pleased also to welcome in this Congress Congressman Sullivan, our vice chairman on the energy subcommittee, as well as Collin Peterson, the ranking member on the Ag Committee, as original cosponsors.

In some shape, or form everyone is affected by the increase in gas prices. Whether it is the seasonal price spikes we are now starting to see across the country or the overall higher prices at the pump the last couple of years, Americans are looking for ways to bring down these costs and break our dependence from hostile sources of foreign oil.

Some see the path forward through renewable fuels like ethanol and biodiesel, which are providing both lower prices at the pump and less dependence on oil. Now we are also waiting for the next generation of cellulosic ethanol and biofuel products to come on line and create an even more renewable fuel right here at home.

Others recognize the promise in our natural gas reservoirs throughout the country. In fact, we had an interesting debate about that just 2 days ago in Chairman Whitfield's committee about our ability to convert this abundant natural resource into a liquid natural gas for transportation fuel could provide yet another significant and inexpensive alternative in the marketplace.

I support an open fuel standard that would break our mandate on gasoline by requiring cars and light-duty trucks to operate on a variety of different fuels. This will allow all fuels to compete in the market, and from there consumers can choose the fuel for their vehicle based upon factors important to them, such as price and miles per gallon. And I hope my colleagues on this committee and the full committee will give that piece of legislation serious consideration.

However, the legislation we are discussing today is not about these or any one fuel option at all. H.R. 4345 would apply to any new fuel or fuel additive approved and registered by the EPA. H.R. 4345 is needed because EPA approved up to 15 percent ethanol blends only in vehicles whose model year is 2001 and newer; in essence, bifurcating the vehicle market. The practical result of EPA's action has been that a morass of pending legal liability and uncertainty have frightened the market and complicated the supply chain's ability to provide a means of delivery for the new fuels.

We will hear today from a retailer community prepared to comply with regulations to legally distribute fuel, yet still be subject to lawsuits if a consumer misfuels their own vehicle.

Similar uncertainty exists for other parties in the supply chain, and they are here to discuss whether this serves as an unavoidable barrier to entry. We need to find out what the specific problems are so the final product of this bill can address them in the most appropriate and targeted way.

The intent of H.R. 4345 is to ensure any party that is compliant with EPA fuel regulations is not subject to litigation based upon those merits alone. As a main sponsor of the bill, I can assure you H.R. 4345 is not an attempt to allow parties to abrogate any of their responsibilities. I do not intend this bill to relieve parties who acted negligently from liability in the court. Nothing in this bill would remove responsibility for environmental cleanup under RCRA, Superfund, or any other Federal or State law. If an under-

ground storage tank containing any fuel were to have a leak, the owner or operator will be liable the same way they are today. H.R. 4345 simply clarifies that just having a registered fuel in a tank EPA has determined compatible does not automatically put you in violation of the law.

The purpose of this legislative hearing is to hear comments on the bill, including suggestions on how to approve it. One of our witnesses suggested that H.R. 4345 as introduced somehow blocks legal actions arising from mishandling of MTBE going back to the days when MTBE was used as an oxygenate instead of ethanol. Frankly, I like ethanol as an oxygenate better than MTBE anyway, but that is a debate we have had numerous times, Mr. Green.

This is certainly not the intent of the legislation, but this really is the reason why we have hearings. And so we are going to hear from our Member from New Hampshire on the panel, and he has raised some good issues that we need to address.

Also, my colleague, as I mentioned earlier, a member of the subcommittee, Mr. Bass has spoken to me personally on this issue because it is a pressing issue for the State of New Hampshire. I appreciate his commitment to work with me in moving forward to ensure H.R. 4345 does not infringe upon ongoing litigation and cleanup in his State involving MTBE.

H.R. 4345 will allow a critical path forward now and into the future to ensure consumer access to new transportation fuels competing in the market to drive costs down.

I want to thank the witnesses for being here today to give their perspective on the bill. I look forward to their testimony and willingness to answer questions to help us as we work to move this legislation forward.

With that, I would like to now yield to the ranking member of the committee, Congressman Gene Green from the great State of Texas.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

Today the subcommittee will hold a order on H.R. 4345, the Domestic Fuels Protection Act of 2012. I am proud to once again be a lead sponsor of this bi-partisan legislation with my colleague on the committee Mr. Ross. This Congress I am also pleased to welcome Congressman Sullivan our vice-chairman on the Energy Subcommittee as well as Colin Peterson the Ranking member of the Agriculture Committee as original co-sponsors.

In some shape or form everyone is affected by increased gas prices. Whether it is the seasonal price spikes we are now starting to see across the country or the overall higher prices at the pump the last few years, Americans are looking for ways to bring down those costs and break our dependence from hostile sources of foreign oil.

Some see the path forward through renewable fuels, like ethanol and bio-diesel, which are providing both lower prices at the pump and less dependence on oil. Now we are also waiting for next generation Cellulosic ethanol and biofuel products to come online and create even more renewable fuel right here at home. Others recognize promise in our natural gas reservoirs throughout the country. The potential to convert this abundant natural resource into liquid natural gas for transportation fuel could provide yet another significant and inexpensive alternative in the market place.

I support an open fuel standard that would look to break our mandate on gasoline by requiring cars and light-duty trucks to operate on a variety of different fuels. This will allow all fuels to compete in the market and from there consumers can

choose the fuel for their vehicle based on factors important to them such as price and miles per gallon.

However, the legislation we are discussing today is not about these or any one fuel option at all. H.R. 4345 would apply to any new fuel or fuel additive approved and registered by the EPA. H.R. 4345 is needed because EPA approved up to 15 percent ethanol blends only in vehicles whose model year is 2001 or newer. The practical result of EPA's action has been that a morass of pending legal liability and uncertainty have frightened the market and complicated the supply chains ability to provide a means of delivery for new fuels.

We will hear today from a retailer community prepared to comply with regulations to legally distribute fuel, yet still be subject to lawsuits if a consumer misfuels their own vehicle. Similar uncertainty exists for others parties in the supply chain and they are here to discuss whether this serves as an unavoidable barrier to entry.

We need to find out what the specific problems are so the final product of this bill can address them in the most appropriate and targeted way. The intent of H.R. 4345 is to ensure any party that is compliant with EPA fuel regulations is not subject to litigation based on those merits alone.

As a main sponsor of the bill I can assure you H.R. 4345 is not an attempt to allow parties to abdicate any of their responsibility. I do not intent this bill to relieve parties who act negligently from liability in court. Nothing in the bill would remove responsibility for environmental cleanup under RCRA, Superfund, or any other federal or state law. If an underground storage tank containing any fuel were to have a leak, the owner or operator will be liable the same way they are today. H.R. 4345 simply clarifies that just having a registered fuel in a tank EPA has determined compatible does not automatically put you in violation of the law.

The purpose of a legislative hearing is to hear comments on the bill, including suggestions on how to improve it. One of our witnesses suggested that H.R. 4345, as introduced, somehow blocks legal actions arising from mishandling of MTBE going back to the days when MTBE was used as an oxygenate instead of ethanol. That is certainly not the intent of the legislation. My colleague and a member of this Subcommittee Congressman Charlie Bass has spoken to me personally on this issue. I appreciate his commitment to work with me moving forward to ensure H.R. 4345 does not infringe upon ongoing litigation and cleanup in his state involving MTBE.

H.R. 4345 will allow a critical path forward now and into the future to ensure consumer access to new transportation fuels competing in the market to drive costs down. I want to thank are witnesses for being here today to give their perspective on the bill. I look forward to their testimony and willingness to answer questions to help us as we work to move this legislation forward.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Thank you, Mr. Chairman. And you and I have debated the difference between MTBE and ethanol, and obviously we lost that battle in the Senate in 2005, but like the Battle of San Jacinto, I don't mind bringing it up all the time.

But first of all, before I go into my statement, I would like to introduce to you and your staff, my staff member handling the committee is Lindsay Westfield, who actually—those of you who remember a few weeks ago we had a full committee markup. I had a great staff member, Abigail Pinkele, who actually worked in our office for many years and was LD, and went downtown, so to speak. And I know, Congressman Murphy and I know she went to work at the National Association of Community Health Centers, which we work with a lot.

But Lindsay will be doing the staffing on the committee, and Lindsay has been in our office, in fact, started literally at the front door, for many years. And I appreciate her working—sitting in on this and doing energy and environment work on our staff.

Mr. Chairman, I want to thank you for holding the hearing today on H.R. 4345, the Domestic Fuels Protection Act of 2012. This is

an issue that I have been actively involved in for a few years, and I am pleased the committee is giving this important issue the attention it deserves.

We have a serious problem coming down the pike, and we have sat on resolving this issue for too long. As the EPA continues to approve and register new fuels and fuel additives needed to comply with the renewable fuel standard, this problem will only grow as refiners will have to increase the ethanol content in a shrinking volume of gas.

The use of renewable fuel such as ethanol in domestic fuels is not a matter of choice by the private sector; rather, it is mandatory as a result of the renewable fuels mandate established in section 211 of the Clean Air Act. If Congress wants renewable fuels to be part of the fuel supply, private-sector fuel refiners and manufacturers must be willing to produce these fuels; however, holding these private entities liable for fuel formulations mandated by the government creates a disincentive for private companies to participate in the renewable fuels program, which would undermine the Clean Air Act goal of increasing the use of these renewable fuels.

So, Mr. Chairman, again, I appreciate your looking into this issue. Unfortunately, I have serious concerns about the approach H.R. 4345 takes and do not think this bill appropriately addresses the problems.

Fuels and fuel additives can pose risks in automobile equipment, in equipment safety, air quality, groundwater and land. That is why States, localities, and Federal agencies have taken action under various statutes to try and mitigate these risks and protect human health, safety, and the environment. H.R. 4345 would preempt and eliminate the vast majority of these requirements, leaving States and municipalities and property owners without protection from or remedies for the damage to their personal effects and potential contamination of our groundwater.

To put it in perspective, I can't imagine anyone in this room would be oK in not having any sort of recourse if your engine is ruined from accidental misfueling. That is why for two Congresses I have been a strong supporter and cosponsor of our fellow Energy and Commerce member, Representative Gonzalez, the American Fuel Protect Act, H.R. 523. This reasonable bill would waive the sovereign immunity of the Federal Government and allow for lawsuits involving the use of ethanol in renewable fuels to be brought exclusively against the Federal Government. Providing this remedy would allow for the redress of legitimate damages without punishing our manufacturers or distributors for simply complying with this Federal Government mandate. Importantly, too, any damages awarded for such a claim would not exceed the actual damage sustained by the plaintiff.

When the government requires a manufacturer to produce products in specific formulations, the government should be responsible for the liability risk associated with these formulations, and with this bill everyone in the transportation fuel chain can rest assured they do not have a fear of litigation for complying with a government mandate while also not depriving the plaintiffs of their day in court.

It is a matter of fairness, Mr. Chairman, and I look forward to working with you in resolving my concerns with H.R. 4345 in addressing the issue.

And I would also like to submit three letters for the record, one from the US Boat Owners Association of the United States; the American Automobile Association, Public Affairs; and also the American Water Works Association. I would like to submit them for the record.

Mr. SHIMKUS. Without objection, these letters will be submitted into the record.

[The information appears at the conclusion of the hearing.]

Mr. GREEN. If I can yield back my time.

Mr. SHIMKUS. If I can just claim your remaining 30 seconds. I just want to give an anecdotal story of a—I won't name my staffer—who years ago drove up to a filling station and put diesel in the gasoline engine of a vehicle. Obviously, he was the one who was negligent, didn't read the pump. We all know diesel pumps are labeled properly and who had to pay for the cleanup, for the repair. It was the person who was negligent in misfueling the vehicle.

And so that basic premise is really the same thing here. We didn't go back and sue the retailer, nor did we go back to the refinery and sue them for producing a product that I shouldn't have—or my staffer shouldn't have put in the tank to begin with. We had to bear the brunt of that mistake. And I think that is really the basic premise of what we are trying to do.

Thank you for the time.

Mr. GREEN. Mr. Chairman, can I just respond?

Mr. SHIMKUS. Yes.

Mr. GREEN. I have a 2002 Chevy Blazer, and I don't put diesel in it, but that engine is hurt by requiring 15 percent ethanol as compared to 10 percent. That is the only option I have when I go into one of our service stations.

So I think I agree, if I do it wrongly, if I put diesel or something in a vehicle, or someone else does, that is—but when you don't have a choice and the government mandates that. The government didn't mandate that diesel fuel.

I yield back my time.

Mr. SHIMKUS. You must not trust the EPA. You know I do, don't you?

I would like to yield now to the chairman of the full committee Mr. Upton for 5 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. On that note, you and I were both staffers, so protect our crew or ourselves.

Thank you for holding this hearing. We know that transportation fuel is varied and changing in the country, and part of the reason why is because of Federal mandates that are enacted and expanded the last number of years.

A number of years ago gasoline blended with 10 percent ethanol was hard to find outside of the heartland, but now it is really just about everywhere. And EPA has recently approved the 15 blends with up to 15 percent ethanol, but not for everyone, not for cars

older than model year 2001; not for boats, lawn mowers, chain saws, other small engines. And that is just a snapshot.

As the renewable share grows under the RFS, we are likely to see more varieties of fuels and fuels blending seeking EPA approval. All of these changes which are coming as a result of the Federal policy have to be dealt with. The market wants and deserves a measure of certainty for sure, not price guarantees or supply quotas, just some confidence that if you refine, distribute, blend or dispense transportation fuel, and you follow all of EPA's rules, you are not going to face legal risk for doing that.

H.R. 4345, the subject of today's hearing, does three main things. First, it says no one will be held liable because of a storage tank or fuel-dispensing equipment not compatible with a particular fuel after EPA says it is compatible.

Second, it says that no person is liable because a self-service purchaser fills up with a fuel not approved for their car or other engine. That is just common sense, like saying the retail store that sells you antifreeze is not liable if you take it home and drink it, or you put diesel fuel in your car that is not supposed to go there.

Third, it ensures that people who design, make, sell or distribute any fuel, vehicle or engine, doesn't face lawsuits resulting solely from the fact that an EPA-approved fuel goes into a vehicle or engine.

So let us be clear on what the bill does not do. It does not change fuel retailers' or anyone else's environmental cleanup obligations under RCRA or Superfund. It does not excuse unfair trade practices or anticompetitive behavior. And it does not say people who act negligently are not held accountable. Instead it says that following EPA regs and selling EPA-approved fuel is not enough to get you into trouble.

And I would yield to any of my Republican colleagues seeking time.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Transportation fuel is varied and changing in this country, and part of the reason why is because of federal mandates enacted and expanded in recent years. A few years ago, gasoline blended with ten percent ethanol was hard to find outside the Heartland. Now it's just about everywhere. And EPA has recently approved E–15—blends with up to 15 percent ethanol—but not for everyone. Not for cars older than model year 2001, and not for boats, lawn mowers, chain saws, and other small engines.

And this is just a snapshot. As the renewable share grows under the Renewable Fuels Standard, we're likely to see more varieties of fuels and fuel blends seeking EPA approval. All of these changes, which are coming as a result of federal policy, must be dealt with. The market wants and deserves some measure of certainty. Not price guarantees or supply quotas, just some confidence that if you refine, distribute, blend, or dispense transportation fuel and you follow all of EPA's rules, you won't face legal risks for doing so.

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And it does not say people who act negligently are not held accountable. Instead it says that following EPA regulations and selling EPA-approved fuel is not enough to get you into trouble.

Mr. SHIMKUS. Mr. Cassidy, were you looking for time for an opening statement?

Mr. CASSIDY. No.

Mr. SHIMKUS. Anybody desiring time? If not, the chairman yields back.

I have been asked by the minority to allow Chairman Waxman, when he arrives, to give his 5-minute opening statement. I think that I would like to do that if there is no objection.

Hearing none, then we will move to our first panel. We will briefly introduce you all, and then we will go—most of you are experienced here. Your full statement is submitted for the record. You have 5 minutes.

From my left to right, we have John Eichberger, vice president government affairs, National Association of Convenience Stores. Next we have Charles Drevna, president of American Fuels and Petrochemical Manufacturers.

Gene, I want you to listen to his testimony carefully.

Mr. GREEN. I reviewed it.

Mr. SHIMKUS. Bob Dinneen, president and CEO of Renewable Fuels Association; Shannon Baker-Branstetter, who is the policy counsel, energy and environment, Consumers Union, Policy & Action, from Consumer Reports; and K. Allen Brooks, senior assistant attorney general and chief, Environmental Protection Bureau, from the State of New Hampshire.

We want to welcome you all. We will start with Mr. Eichberger. You are recognized for 5 minutes for your opening statement.

STATEMENTS OF JOHN EICHBERGER, VICE PRESIDENT, GOVERNMENT RELATIONS, NATIONAL ASSOCIATION OF CONVENIENCE STORES; CHARLES T. DREVNA, PRESIDENT, AMERICAN FUELS AND PETROCHEMICAL MANUFACTURERS; BOB DINNEEN, PRESIDENT AND CEO, RENEWABLE FUELS ASSOCIATION; SHANNON BAKER–BRANSTETTER, POLICY COUNSEL, ENERGY AND ENVIRONMENT, CONSUMERS UNION POLICY & ACTION FROM CONSUMER REPORTS; AND K. ALLEN BROOKS, SENIOR ASSISTANT ATTORNEY GENERAL AND CHIEF, ENVIRONMENTAL PROTECTION BUREAU, STATE OF NEW HAMPSHIRE

STATEMENT OF JOHN EICHBERGER

Mr. EICHBERGER. Thank you, Chairman Shimkus and Ranking Member Green. I appreciate the opportunity to be here to explain why NACS supports H.R. 4345. The convenience store industry operates 149,000 stores in the Nation of which about 121,000 sell fuel. Through these stores our industry sells about 80 percent of the gasoline consumed in the United States every year. This puts

retailers right in the middle of policies and consumers who are trying to bring them to market.

Our reasons for supporting 4345 are actually quite simple. As you look into the future for the market, we know new fuels will be developed. The renewable fuel standard makes this an absolute certainty, as Chairman Upton mentioned. New renewable fuels must be brought to consumers. As these fuels are approved, and consumers begin to ask for them, NACS members want to satisfy consumer demand and offer these fuels. If they are not able to do so, it is likely that the goal that Congress set when it established the RFS will not be met, which is precisely why 4345 is important.

First, and I think it is important, our members want to be responsible retailers. They take very seriously their role in protecting the environment, prevent releases. Some of you were on the subcommittee when it considered the Energy Policy Act of 2005, and you may remember that NACS was the strongest advocate, supporting increased enforcement of our gas storage tank regs. We pushed for legislation to require inspections, operator training, and shutting down noncompliant tanks.

Our commitment to ensuring the integrity of our tank systems has not changed. If you think about it, this makes sense. Convenience stores are part of their communities. In fact, 58 percent of the stores that sell fuel are one-store mom-and-pop operators who probably live right around the corner from the store. They live in the communities they serve, and they don't want to pollute or tarnish their reputation. They care about the communities, not to mention, if they have a release, it is extremely expensive to clean it up. So their commitment to making sure that the stuff they put in their tanks does not release is absolutely pure.

Retailers are also reluctant to spend maybe $100,000 to replace equipment that is perfectly suitable for the fuel they want to sell, and that is where 4345 comes in. The bill will establish a mechanism for retailers to determine if their existing equipment is safe and compatible to dispense a new fuel. That is it. H.R. 4345 says if the equipment is technically safe and compatible, it should be legally recognized as safe and compatible. If the equipment is not compatible, retailers are going to have to replace it, and that is the bottom line. We don't want to use noncompatible equipment, but we shouldn't have to replace equipment that is compatible. It is that simple.

There is nothing in this bill that changes the retailer's responsibility to prevent releases or to clean up any contamination that results from a release. It simply gives them a legal mechanism for determining if their equipment is compatible.

The other main reason our members support this bill is to ensure there is a clear set of rules by which they must operate and some reasonable legal protections for them when they do comply with the rules. H.R. 4345 addresses it in two simple ways. One, if EPA approves a fuel for a subset of engines, the bill requires EPA to issue regulations to prevent misfueling. The bill does not dictate what these regulations must say. EPA may determine that labels are all that is necessary, or it may require nozzle and fill pipe restrictions, or it may even require that the fuel be sold behind a locked cage.

Whatever the rules, retailers will comply. And those rules are going to be determined through the agency rulemaking process.

Once those rules are established, if retailers do comply, they want to know that if someone else circumvents those rules and those misfueling provisions, they are not going to be held responsible for that other party's actions. They do not believe they should be held accountable for actions that are beyond their control, and 4345 provides them that protection.

And then once a fuel is approved, and the rules governing the sale of that fuel are established, retailers will comply. If the rules change, or a fuel is removed from the market, retailers will adapt and comply with the new rules. That is only reasonable, and we do that all the time. However, my members do not believe it is reasonable to hold them accountable to comply with a regulation or rule that does not yet exist. Our members say, tell us what we have to do, and we will do it, but don't turn around and punish us for someone else's behavior or hold us responsible if you later change the rules on us. You have to give us an opportunity to comply with the new rules.

H.R. 4345 is a reasonable and limited bill that provides certainty to the market. This is why NACS' members support the legislation. I urge the committee to proceed with consideration of enactment of this bill to provide the market with the certainty it needs to bring innovative fuels to the market.

Thank you. I look forward to your questions.

Mr. SHIMKUS. Thank you.

[The prepared statement of Mr. Eichberger follows:]

TESTIMONY OF

JOHN EICHBERGER,
VICE PRESIDENT OF GOVERNMENT RELATIONS,
NATIONAL ASSOCIATION OF CONVENIENCE STORES

BEFORE THE

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

APRIL 19, 2012

LEGISLATIVE HEARING:

H.R. 4345,
"THE DOMESTIC FUELS PROTECTION ACT OF 2012"

SUMMARY OF TESTIMONY OF JOHN EICHBERGER, NACS

- NACS members make decisions each day regarding what products to sell and which services to offer their customers. But taking a chance by offering a new candy bar is very different from switching their fueling infrastructure to accommodate a new fuel. For this reason, and many others, they are guarded about adopting new fuel products until they are certain sufficient consumer demand exists to provide a reasonable return on their investment – an investment which in many cases can be significant.

- Our industry is committed to complying with today's laws and regulations, to provide our customers with the best products and services we can offer and to adapt to new technologies and market opportunities as they arise. NACS members are not beholden to any specific product – they simply desire to sell what the customer wants to buy provided it is lawful and, hopefully, profitable to do so. As new fuels come onto the market, our members want to have the legal option to sell these fuels if their customers wish to buy them.

- Retailers face many challenges when considering whether to sell a new fuel and these challenges must be overcome if the goals of the Renewable Fuels Standard (RFS) are to be realized. Among these issues are the compatibility of retail storage and dispensing equipment; associated risks of a customer fueling a non-authorized engine with a new fuel; and associated risks of retroactive liability if today's laws governing the sale of such fuels change in the future.

- H.R. 4345, the Domestic Fuels Protection Act of 2012, addresses each of these challenges directly and NACS urges enactment of this legislation.

- H.R. 4345 provides a way for existing retail equipment that is technically compatible with new fuels to be legally recognized as such, thereby eliminating some of the costs associated with unnecessary equipment replacement; it protects market participants from liability in the event self-service consumers circumvent federally required misfueling measures; and, it protects market participants from retroactive liability should today's laws governing fuel sales change in the future.

- America's fuel retailers want to provide consumers with the choices they demand and the fuels that are not only approved by the federal government, but effectively encouraged and even required by the government. Enacting H.R. 4345 will remove key legal impediments that make it difficult and impractical, or even impossible, to bring these fuels to market. H.R. 4345 will promote innovation in the motor fuels marketplace.

INTRODUCTION

Chairman Shimkus, Ranking Member Green, members of the Subcommittee, thank you for the opportunity to speak with you today. My name is John Eichberger and I am Vice President of Government Relations for the National Association of Convenience Stores (NACS).

NACS is an international trade association representing the convenience and fuel retailing industry. Our membership consists of nearly 2,200 retail member companies and nearly 1,800 supplier companies. In 2011, the industry operated 148,000 stores in the United States, generated $681.9 billion in sales (representing $1 of every $22 spent in the U.S.), of which $486.9 billion was in motor fuels. The industry sells more than 80% of the fuel consumed in the country and employs more than 1.8 million workers.

Our industry is dominated by small businesses. In fact, of the 121,000 convenience stores that sell fuel, 58.2% of them are single-store companies – true mom and pop operations. Despite common misperceptions, the large integrated oil companies are leaving the retail market place and today own and operate fewer than 1% of the retail locations. Although a store may sell a particular brand of fuel associated with a refiner, the vast majority are independently owned and operated and the relationship to the fuel brand they sell ends there. The rest have sought to establish their own brand in the market.

NACS members make decisions each day regarding what products to sell and which services to offer their customers. But taking a chance by offering a new candy bar is very different from switching their fueling infrastructure to accommodate a new fuel. For this reason, and many others, they are guarded about adopting new fuel products until they are certain sufficient consumer demand exists to provide a reasonable return on their investment – an investment which in many cases can be significant.

Our industry is committed to complying with today's laws and regulations, to provide our customers with the best products and services we can offer and to adapt to new technologies and market opportunities as they arise. NACS members are not beholden to any specific product – they simply desire to sell what the customer wants to buy provided it is lawful and, hopefully, profitable to do so. As new fuels come onto the market, our members want to have the legal option to sell these fuels if their customers wish to buy them.

It is with this background that NACS strongly endorses H.R. 4345, the Domestic Fuels Protection Act of 2012, which addresses some of the legal challenges facing retailers and begins to create a market in which retailers can make lawful business decisions concerning which fuels they will sell to their customers.

THE NEED FOR H.R. 4345

Since enactment of the Energy Independence and Security Act (EISA) of 2007, Washington has been discussing the pending arrival of the so-called "blend wall" – that point beyond which the market cannot absorb any additional renewable fuels. We can now say unequivocally that we are there.

The 2012 statutory mandate for the RFS is 15.2 billion gallons. If 10% ethanol were blended into every gallon of gasoline sold in the nation in 2011 (133.9 billion gallons), the market would reach a maximum of 13.39 billion gallons. Meanwhile the market for higher blends of ethanol (E85) for flexible fuel vehicles (FFVs) has not developed as rapidly as some had hoped and there are few indications for a rapid expansion. So clearly we have a problem.

The decision by EPA to authorize the use of E15 in certain vehicles and engines does very little to expand the use of renewable fuels. This is primarily because, although registrations have been issued for the fuel as an additive, there remain many legal barriers to the introduction of E15 and other fuels and fuel additives that Congress must address.

H.R. 4345 will address some of the legal issues that are preventing retailers from even considering whether to sell new fuels like E15. It is important to note that this legislation is not an E15 bill – it applies to any new fuel formulations or additives approved and registered by the EPA. E15 is often used as the primary example to demonstrate how this legislation would affect the market because it is a fuel with which we are now very familiar. However, H.R. 4345 is fuel-neutral; it is designed to facilitate the introduction of innovative new fuels.

H.R. 4345 addresses three areas of legal concern limiting the introduction of new fuels – infrastructure incompatibility, liability for consumer misuse of fuels, and retroactive liability if the rules governing a fuel change in the future.

COMPATIBILITY

The reason the retail market is unable to accommodate additional volumes of renewable fuels begins with the equipment found at retail stations. By law, all equipment used to store and dispense flammable and combustible liquids must be certified by a nationally recognized testing laboratory. These requirements are found in regulations of the Occupational Safety and Health Administration.[1]

Currently, there is essentially only one organization that certifies such equipment – Underwriters Laboratories (UL). UL establishes specifications for safety and compatibility and runs tests on equipment submitted by manufacturers for UL listing. Once satisfied, UL lists the equipment as meeting a certain standard for a certain fuel. Prior to 2010, UL had not listed a single motor fuel dispenser (a.k.a, a pump) as compatible with any fuel containing more than 10% ethanol. This means that any dispenser in the market prior to early 2010 is not legally permitted to sell E15, E85 or anything above 10% ethanol – even if it is technically able to do so safely.

If a retailer fails to use listed equipment, that retailer is violating OSHA regulations and may be violating tank insurance policies, state tank fund program requirements, bank loan covenants, and potentially other local regulations. In addition, the retailer could be found negligent per se based on the sole fact that his fuel dispensing system is not listed by UL.

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[1] 29 CFR 1926.152(a)(1) "Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids." "Approved" is defined at 29 CFR 1910.106 (35) ("Approved unless otherwise indicated, approved, or listed by a nationally recognized testing laboratory.")

This brings us to the primary challenge: If no dispenser prior to early 2010 was listed as compatible with fuels containing greater than ten percent ethanol, what options are available to retailers to sell these fuels?

In February 2009,[2] UL issued a letter announcing that dispensers listed under a certain UL standard as compatible with E10 were in fact safe to handle fuels containing up to 15% ethanol. UL said that it would support "local authorities having jurisdiction" to provide waivers to retailers who wished to increase their ethanol blends through these dispensers. UL did not, however, change the official certification of those dispensers. Consequently, retailers who relied upon local authority waivers would still be in violation of all laws and regulations requiring listed equipment.

However, in December 2010[3] UL rescinded that notice based upon new research that indicated issues with gaskets, seals and hoses when exposed to E15. UL now recommends that only equipment specifically listed by UL as compatible with E10+ fuels be used for such fuels.

Unfortunately, this places a significant economic burden on the retail market. UL policy prevents retroactive certification of equipment. In other words, only those units produced after UL certification is issued are so certified – all previously manufactured devices, even if they are the exact same model using the exact same materials, are subject only to the UL listing available at the time of manufacture. This means that no retail dispensers, except those specific units produced after UL issued a listing in 2010, are legally approved for E10+ fuels.

In other words, under current requirements the vast majority of retailers wishing to sell E10+ fuels must replace their dispensers. On average, a retail motor fuel dispenser costs approximately $20,000.

It is less clear how many underground storage tanks and associated pipes and lines would require replacement. Many of these units are manufactured to be compatible with high concentrations of ethanol, but they may not be listed as such. Further, if there are concerns with gaskets and seals in dispensers, care must be given to ensure the underground gaskets and seals do not pose a threat to the environment. Once a retailer begins to replace underground equipment, the cost can escalate rapidly and can easily exceed $100,000 per location.

Last year, EPA issued guidelines for determining the compatibility of underground storage tank equipment with new fuels. Those guidelines, which are now being incorporated into regulations, stipulate that compatibility can be demonstrated either with a listing from a nationally recognized testing laboratory, written documentation by the equipment manufacturer or another standard to be adopted by the states. NACS is supportive of these regulations, but they offer retailers very limited certainty.

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[2] Underwriters Laboratories at .
(http://www.ul.com/global/eng/pages/corporate/newsroom/newsitem.jsp?cpath=%2Fglobal%2Feng%2Fcontent%2Fcorporate%2Fnewsroom%2Fpressreleases%2Fdata%2Funderwriterslaboratoriesannouncessupportforauthoritieshavingjurisdiction20090219140900_20090219140900.xml)

[3] Underwriters Laboratories at
(http://www.ul.com/global/eng/pages/offerings/industries/energy/alternative/flammableandcombustiblefluids/updates/)

First, the regulations do not establish a minimum standard of care to govern the self-certification procedures of the equipment manufacturer.

Second, the regulations apply only to underground storage tank systems – they do not cover the fuel dispenser itself.

Finally, these regulations do not protect a retailer from his legal obligations for using compatible equipment enforced by other jurisdictions. It is unclear whether the regulations will satisfy OSHA regulations, tank insurance, or other requirements.

H.R. 4345 seeks to fix these problems, in our view. The legislation directs the EPA to revise these regulations to establish a minimum standard of care for manufacturer self-certification to ensure there is no backsliding in protecting the environment; it establishes that the compatibility regulations will apply to the fuel dispenser; and it provides the equipment owner with regulatory and legal certainty by stipulating that equipment which satisfies the EPA compatibility requirements will be considered to satisfy all compatibility-related requirements that may be applied to the retailer.

It is important to note that H.R. 4345 does not in any way relieve a tank owner from any responsibilities regarding a fuel release. The retailer will remain responsible for preventing a fuel release and for cleaning up any contamination that may occur as a result of a release. However, the retailer will not be per se negligent provided that his equipment satisfies the requirements established by the EPA.

NACS finds it interesting that some believe retailers are supporting H.R. 4345 because they want a license to pollute. I would like to remind the committee that during consideration of the Energy Policy Act of 2005, NACS members were among the most vocal advocates for additional resources and authority for underground storage tank officials to enforce the regulations and shut-down non-compliant tank systems.

NACS members take very seriously their responsibility to protect the environment and prevent releases from their systems. Their support for this legislation is based upon the realization that some of the equipment at their stations is technically compatible and can safely store and dispense new fuels. If their equipment is compatible, they see no reason why they should be required to incur significant expense to replace it.

MISFUELING

The second major issue facing retailers is the potential liability associated with improperly fueling an engine with a non-approved fuel. The EPA decision concerning E15 puts this issue into sharp focus for retailers. Under EPA's partial waiver, only vehicles manufactured in model year 2001 or more recently are authorized to fuel with E15. Older vehicles, motorcycles, boats, and small engines are not authorized to use E15.

For the retailer, bifurcating the market in this way presents serious challenges. For instance, how does the retailer prevent the consumer from buying the wrong fuel? Typically, when new fuels

are authorized they are backwards compatible so this is not a problem. In other words, older vehicles can use the new fuel. Here are some examples:

> **Example 1:** When EPA phased lead out of gasoline in the late 1970s and early 1980s, older vehicles were capable of running on unleaded fuel – newer vehicles, however, were required to run only on unleaded. These newer vehicle gasoline tanks were equipped with smaller fill pipes into which a leaded nozzle could not fit – likewise, unleaded dispensers were equipped with smaller nozzles.
>
> **Example 2:** When EPA mandated a 97% reduction in the sulfur content of on-road diesel fuel, trucks manufactured beginning with model year 2007 were required to use only ultra-low sulfur diesel (ULSD) fuel – earlier model trucks were able to run on this new fuel. Misfueling was limited by a combination of a mandated oversupply of ULSD (which limited the supply of the restricted fuel and therefore limited the potential for misfueling) and enforced labeling and inventory management requirements.

E15 is very different: legacy engines are not permitted to use the new fuel. Doing so will violate Clean Air Act standards and could cause engine performance or safety issues. Yet, there are no viable options to retroactively install physical countermeasures to prevent misfueling. Further, the risk to retailers of a customer using E15 in the wrong engine – whether accidentally or intentionally - are significant.

First of all, retailers could be subject to penalties under the Clean Air Act for not preventing a customer from misfueling with E15. This concern is not without justification. In the past, retailers have been held accountable for the actions of their customers. For example, because unleaded fuel was more expensive than leaded fuel, some consumers physically altered their vehicle fill pipes to accommodate the larger leaded nozzles either by using can openers or by using a funnel while fueling. We may see similar behavior in the future given the high price of gasoline relative to ethanol. As in the past, the retailer will have no ability to prevent such practices, but in the case of leaded gasoline the EPA levied fines against the retailer for not physically preventing the consumer from bypassing the misfueling countermeasures.

To EPA's credit, they have asserted that they would not be targeting retailers for consumer misfueling. But that provides little comfort to retailers – EPA policy can change in the absence of specific legal safeguards. Further, the Clean Air Act includes a private right of action and any citizen can file a lawsuit against a retailer that does not prevent misfueling. Whether the retailer is found guilty does not change the fact that defending against such claims can be very expensive.

Further, the consumer may seek to hold the retailer liable for their own actions. Using the wrong fuel could void an engine's warranty, cause engine performance problems or even compromise the safety of some equipment. In all situations, some consumers may seek to hold the retailer accountable even when the retailer was not responsible for the improper use of the fuel. Once again, the defense to such claims can be expensive.

H.R. 4345 addresses this challenge directly. It requires the EPA to issue misfueling regulations whenever the agency approves a fuel for only a subset of engines. EPA has already taken such steps with regards to E15 and has issued regulations requiring E15 retailers to affix a specific label to their dispensers to inform consumers of the authorized and prohibited uses of the fuel. In addition, certain inventory management procedures are required.

H.R. 4345 provides that neither a retailer, nor a retailer's supplier, can be held responsible for violating the Clean Air Act in the event a self-service customer introduces a registered fuel into an engine for which that fuel has not been approved. However, if the retailer fails to comply with the misfueling regulations issued by the agency then that retailer can be held responsible.

H.R. 4345 also addresses another potential liability associated with an engine warranty. The EPA decision to approve E15 for 2001 and newer vehicles is not consistent with the terms of most warranty policies issued with these affected vehicles. Consequently, while using E15 in a 2009 vehicle might be lawful under the Clean Air Act, it may in fact void the warranty of the consumer's vehicle. Retailers have no mechanism for ensuring that consumers abide by their vehicle warranties – it is the consumer's responsibility to comply with the terms of their contract with their vehicle manufacturer. Therefore, H.R. 4345 stipulates that no person shall be held liable in the event a self-service customer introduces a fuel into their vehicle that is not covered by their vehicle warranty. The notable exception also applies here – the retailer can be held liable if they fail to comply with the misfueling regulations issued by the EPA.

H.R. 4345 does not stipulate what constitutes an appropriate misfueling regulation, and NACS members are prepared to comply with whatever is mandated. The current regulations affecting E15 include labeling and inventory management provisions. If EPA requires a certain fuel be sold from a locked cage, retailers who wish to sell that fuel will do so. NACS is supporting H.R. 4345's misfueling provisions because retailers need to be given some legal certainty with respect to their business operations. If they abide by the rules, they should be protected from liability.

GENERAL LIABILITY EXPOSURE

Finally, there are widespread concerns throughout the retail community and with our product suppliers that the rules of the game may change and we could be left exposed to significant liability. For example, E15 is approved only for certain engines and its use in other engines is prohibited by the EPA due to associated emissions and performance issues.

What if E15 does indeed cause problems in non-approved engines or even in approved engines? What if in the future the product is determined defective, the rules are changed and E15 is no longer approved for use in commerce? There is significant concern that such a change in the law would be retroactively applied to any who manufactured, distributed, blended or sold the product in question.

Retailers are hesitant to enter new fuel markets without some assurance that their compliance with the law today will protect them from retroactive liability should the law change in the future. It seems reasonable that law abiding citizens should not be held accountable if the law changes in the future. And that is what H.R. 4345 does. It helps overcome significant resistance to new fuels by providing assurances that market participants will only be held to account for the

laws as they exist at the time and not subject to liability for violating a future law or regulation. If the rules change, retailers will adjust and comply, but they cannot be expected to comply with laws that do not yet exist.

CONCLUSION

The current debate has been centering on the effects of E15 in the marketplace. H.R. 4345 is not fuel specific, however. Rather, it seeks to set a path through which the market has a better chance of complying with the mandates of the RFS. Successful implementation of the RFS, especially in light of the proposed corporate average fuel economy revisions, will require an average blend ratio of 30 – 40% renewable fuel in every single gallon.

H.R. 4345 is the necessary first step to reduce the cost of introduction of new fuels and to provide long-term regulatory and legal certainty to the market.

When considering this legislation, Congress must take into consideration that it was not long ago (1988-1998) that federal law required that all USTs in the country be removed from the ground and retrofitted with leak detection, spill prevention, and anti-corrosion systems. The wholesale retrofit requirements led to the closure of thousands of facilities due to the costs required to comply with the new law. Since then, many states have enacted additional requirements that have forced retailers to retrofit or replace the systems that were installed to comply with the federal law. Another round of mandatory replacements will be difficult for all retailers, and impossible for many, to endure.

H.R. 4345 is a reasonable and responsible approach to preventing a motor fuels crisis in this country.

On behalf of the members of NACS, I appreciate the opportunity to share our perspective with you today and I urge this committee to proceed to markup on the Domestic Fuels Protection Act of 2012 at the earliest possible time.

Mr. SHIMKUS. And now I would like to recognize Mr. Drevna for 5 minutes, thank you. And your opening statement is in the record. You have 5 minutes.

STATEMENT OF CHARLES T. DREVNA

Mr. DREVNA. Chairman Shimkus, Ranking Member Green and members of the subcommittee, thank you for giving me the opportunity today to testify at this hearing on the Domestic Fuels Protection Act of 2012.

Charlie Drevna, and I serve as AFPM's president. AFPM is a 110-year-old trade association that was formerly known as the National Petrochemical and Refiners Association up until this year. AFPM members use oil and natural gas liquids as raw materials to manufacture virtually the entire supply of U.S. Gasoline, diesel, jet fuel, home heating oil and other fuels, along with petrochemicals used in thousands of products.

We support the Domestic Fuels Production Act. Now, as we have stated for years, and it comes as no surprise to this subcommittee or any committee in this Congress, we oppose subsidies, and we oppose mandates. We continue to have serious questions about the workability, structure, and unintended consequences of the existing renewable fuel standard. However, as long as the RFS remains the law, and it is the law of the land today, our members must work to comply with its requirements.

The Domestic Fuels Production Act would provide the necessary legal certainty for all parties in the transportation fuel supply chain. This is critically important as the Environmental Protection Agency approves and registers new fuels and new fuel additives needed to comply with the ever-expanding RFS.

Under the RFS, 36 billion gallons of renewable fuels must be available in the U.S. marketplace by 2022, 10 short years from now. That is a dramatic increase from the 13.7 billion gallons of renewable fuels available last year.

With rising mandates, falling demand, refiners are required to increase ethanol content in a shrinking volume of gasoline; however, the refining industry is only one of several domestic industries that will have to address these challenges. Engine manufacturers as well as transportation fuel providers all face challenges posed by the need for alternative fuels under the existing RFS. Our challenge again, as long as the RFS is the law of the land, is to integrate these new fuels in the fuel supply.

All parties in the transportation fuel supply chain need to know they will not face a blizzard of unwarranted litigation simply for complying with the law that Congress deemed necessary. The Domestic Fuels Production Act provides such certainty. Companies that use, manufacture, and sell transportation fuels that meet government-approved, government-mandated specifications and standards should not be punished for doing so. The Domestic Fuels Production Act accomplishes that goal, and we encourage Congress to act on this important legislation.

Thank you, and I will be happy to respond to any questions you may have.

Mr. SHIMKUS. Thank you.

[The prepared statement of Mr. Drevna follows:]

WRITTEN STATEMENT OF

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS

AS SUBMITTED TO THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

Committee on Energy and Commerce
United States House of Representatives

on

"H.R. 4345, The Domestic Fuels Protection Act of 2012"

April 19, 2012

Summary of Major Points by the American Fuel & Petrochemical Manufacturers (AFPM) to the House Subcommittee on Environment and the Economy – April 19, 2012

1) The American Fuel & Petrochemical Manufacturers supports the Domestic Fuels Protection Act. We oppose subsidies and mandates and we have serious questions about the workability, structure, and unintended consequences of the existing Renewable Fuel Standard. However, as long as the RFS remains the law, our members must work to comply with its requirements.
2) The Domestic Fuels Protection Act would provide legal certainty for all parties in the transportation fuel supply chain. This is important as EPA approves and registers new fuels and fuel additives needed to comply with the RFS.
3) Under the RFS, 36 billion gallons of renewable fuels must be available in the U.S. marketplace by 2022. That's a dramatic increase from the 13.7 billion gallons of renewable fuels available in our nation last year. With rising mandates and falling demand, refiners must increase ethanol content in a shrinking volume of gasoline.
4) The refining industry is only one of several domestic industries that will have to address these challenges. Engine manufacturers as well as transportation fuels providers – including ethanol producers – all face challenges posed by the need for alternative fuels under the RFS. Our challenge is to integrate these new fuels into the fuel supply.
5) All parties in the transportation fuel supply chain need to know they will not face a blizzard of unwarranted litigation simply for complying with the law. The Domestic Fuels Protection Act provides such certainty.

I. Introduction

Chairman Shimkus, Ranking Member Green and Members of the Subcommittee, thank you for giving me the opportunity to testify at this hearing on the Domestic Fuels Protection Act of 2012. I'm Charlie Drevna and I serve as president of AFPM, the American Fuel & Petrochemical Manufacturers.

AFPM is a 110-year old trade association, formerly known as the National Petrochemical & Refiners Association until earlier this year. AFPM represents high-tech American manufacturers that use oil and natural gas liquids as raw materials to make virtually the entire U.S. supply of gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life.

AFPM members make modern life possible while keeping America moving and growing as we meet the needs of our nation and local communities, strengthen economic and national security, and support 2 million American jobs. The entire oil and natural gas sector – including the producers of oil and natural gas – supports more than 9 million American jobs and pays more than $31 billion a year in taxes to the U.S. government, plus additional funds to state and local governments.

Our members have stayed in business for more than a century because our top priority has always been to serve American consumers by manufacturing products that meet the highest standards of quality, safety, efficiency and reliability.

II. The Domestic Fuels Protection Act

AFPM supports the Domestic Fuels Protection Act. As we have stated for years, we oppose subsidies and mandates and have serious questions about the workability, structure, and unintended consequences of the existing Renewable Fuel Standard (RFS). However, the RFS remains the law of the land and our members must comply with its requirements. The Domestic

Fuels Protection Act would provide necessary legal certainty for all parties in the transportation fuel supply chain as the Environmental Protection Agency (EPA) approves and registers new fuels and fuel additives that will be needed to comply with government mandates.

In particular, under the RFS, 36 billion gallons of renewable fuels must be available in the U.S. marketplace by 2022. That is a dramatic increase from the 13.7 billion gallons of renewable fuels available in the U.S. in 2011. With rising mandates and falling demand, refiners are placed in a situation of being required to increase renewable content in gasoline.

The refining industry is only one of several domestic industries that will have to address these challenges. Engine manufacturers (auto and non-road) as well as transportation fuels providers (retailers, marketers, and fuels manufacturers) – including ethanol producers – all face challenges posed by the need for alternative fuels to be integrated into the fuel supply in a manner that will not lead to unintended negative consequences for consumers.

Given this reality, all parties in the transportation fuel supply chain need to know they will not face a blizzard of unwarranted litigation simply for complying with the law. The Domestic Fuels Production Act provides such certainty. The legislation simply states that if the government approves and registers a fuel or fuel additive for sale in interstate commerce and the parties in the transportation fuels supply chain introduce such fuels in accordance with relevant government requirements, these same parties will not be liable for any unintended consequences associated with the use of those products.

It is equally important for Members of this Subcommittee to appreciate what this bill does and does not do. It does not presuppose a judgment on the merits (or lack thereof) of E15 or other alternative fuels. The bill is essentially fuel-neutral in that it only extends liability protection to manufacturers and producers once the government has taken several affirmative

steps to approve and then register these new fuels or additives for sale based on testing the government believes reliable enough to safeguard against unintended harm to consumers. If the government is later proven incorrect in its assessment of harm, yet all parties in the transportation fuels universe have complied with relevant specifications for manufacture and use of these fuels, then liability should not attach to those same parties. The legislation does not confer any liability protection for the negligent manufacture of these fuels nor the handling of them throughout the supply chain. In this regard, this legislation mirrors the protection afforded to pharmaceutical manufacturers of certain vaccines required by the government to be developed and sold to the population at large to address health concerns.

The protections in the Domestic Fuels Act are particularly important given the interaction of federal fuel economy standards with the RFS. If the RFS and corporate average fuel economy (CAFE) standards are fully achieved, our industry is facing the prospect of blending upwards of 35 percent ethanol per gallon of fuel, presenting significant new technical and marketplace challenges associated with RFS compliance. Moreover, and as additional alternative fuels find their way onto the market after being tested, approved, and registered for sale by the government, the parties in the transportation fuels universe should not have to keep coming before Congress seeking liability protection for actions they are required to take to comply with the RFS. The subcommittee should, however, be aware of the responsibility that the Clean Air Act places on the government to perform adequate testing to ensure that these fuels will operate in engines and infrastructure without harm to those engines or consumers.

The Domestic Fuels Protection Act is an important tool that allows our members to comply with the law and achieve higher ethanol volumes in fuels without facing meritless multiyear, multimillion-dollar lawsuits.

III. Conclusion

In order to better enable the EPA-approved introduction of new fuels into commerce, Congress should act to remove the threat of unwarranted and frivolous litigation. Companies that use, manufacture and sell transportation fuels that meet government-approved specifications in accordance with appropriate government standards should not be punished for doing so. The Domestic Fuels Protection Act accomplishes that goal and we urge Congress to act on this important legislation.

Mr. SHIMKUS. Next I would like to recognize Mr. Dinneen, and you are recognized for 5 minutes.

STATEMENT OF BOB DINNEEN

Mr. DINNEEN. Thank you, Mr. Chairman. Thank you, Ranking Member Green, members of the committee. I appreciate the opportunity to be here today to speak in support of H.R. 4345, the Domestic Fuels Protection Act.

I got to tell you, I think this is an important hearing in an important time, because consumers are facing rising gasoline prices, and if we do not find a way to reduce our dependency on imported oil, we will continue to suffer the consequences.

At the outset I must note that this committee has already put in place a program that is today reducing our dependence on imported oil, creating jobs and economic opportunity across rural America, and reducing gasoline prices at the pump. That program is the renewable fuel standard, and that program is working.

Consider these facts: In 2005, when the RFS was adopted, the U.S. imported more than 60 percent of our crude oil and petroleum products; today, in large part because of the RFS, we are just 45 percent dependent on crude oil imports.

Now, look, it is clear that increased domestic oil production and increased efficiency have played a role in that success as well, but consider this: Since 2005, 81 percent of the increased domestic fuel production in this country has been ethanol; 8 out of every 10 new gallons of fuel produced in this country has been ethanol. That is the success of the RFS. That is the success of ethanol.

Now, as the ethanol industry has continued to grow, indeed the economic footprint of the industry has just gotten better as well. The 14 billion gallons of ethanol that were produced and used in this country last year created some 400,000 jobs. We added $43 billion to GPD, $30 billion to household income. That is a success that is being felt all across America.

But perhaps most importantly, as consumers continue to face skyrocketing gasoline prices at the pump, is that ethanol is lowering the price consumers pay at the pump today. Two reasons for that. Ethanol today is a dollar cheaper than gasoline, so you are adding 10 percent ethanol today, hopefully 15 percent pretty soon, it is going to reduce consumer gasoline costs commensurately. But also, because ethanol is now 10 percent of the Nation's motor fuel supply, we are reducing the demand for imported oil, and that is having an additional economic benefit for consumers.

A study that was done last year said that the ethanol produced in 2010 reduced gasoline prices by 89 cents a gallon. That is a real benefit to consumers. That is a real benefit of the RFS.

So I can say without hyperbole or reservation that the RFS has been the most successful energy policy this Nation has ever implemented. It should be vigorously defended and maintained and allowed to reach its full potential of 36 billion gallons in 2022.

But the RFS is entering a critical period. The volumes of renewable fuels refiners are required to meet can no longer be met just by 10 percent ethanol. Greater volumes of ethanol and a greater diversity of biofuels and feedstocks will be necessary to meet the increasing volumes required by the RFS. Critically, these fuels will

be attempting to enter the marketplace amidst a complicated regulatory structure that favors incumbent technologies and discourages market access. Gasoline marketers deserve the certainty that they will not be penalized for utilizing a new fuel or fuel blend that has been approved for use by EPA.

H.R. 4345 supports the RFS and facilitates the introduction of additional volumes of renewable fuel by assuring gasoline marketers don't need to replace perfectly good underground equipment and above-ground dispensing apparatus to market renewable fuels. The current regulatory structure provides no pathway to certify existing equipment for anything other than fossil fuels. Even when test data demonstrates its safety, the Domestic Fuels Protection Act allows EPA to create such a process, thereby providing new fuels access to the marketplace without having to expend time and resources on new infrastructure unnecessarily.

The bill also provides assurances to retailers that they won't be subjected to frivolous lawsuits when they have abided EPA regulations. The legislation is narrowly tailored to achieve this goal.

In sum, the RFA supports H.R. 4345 because it is consistent with the goals of promoting energy independence, through the increased use of renewable fuels as outlined by the energy bill. The Domestic Fuels Protection Act would eliminate technical barriers and speed the introduction of new fuels that can help decrease our Nation's reliance on oil and lower gasoline prices.

Chairman Shimkus, you have made a real commitment to the growth of this industry with your support of this legislation, with your support of the open fuel standard, which we also support, and I look forward to working with you and the rest of the committee to move this legislation forward. Thank you.

Mr. SHIMKUS. Thank you very much.

[The prepared statement of Mr. Dinneen follows:]

House Energy and Commerce Committee
Subcommittee on Environment and Economy
United States House of Representatives

Hearing on
H.R. 4345, The Domestic Fuels Protection Act of 2012

Testimony of

Bob Dinneen
President & CEO, Renewable Fuels Association

April 19, 2012

Good morning, Chairman Shimkus, Ranking Member Green, and Members of the Subcommittee. My name is Bob Dinneen and I am president and CEO of the Renewable Fuels Association (RFA), the national trade association representing the U.S. ethanol industry.

The RFA is the leading trade association for America's ethanol industry. Its mission is to advance the development, production, and use of fuel ethanol by strengthening America's ethanol industry and raising awareness about the benefits of renewable fuels. Founded in 1981, RFA's 300-plus producer and associate members are working to help America become cleaner, safer, energy independent and economically secure.

This is a timely and important hearing. Gasoline prices are inching closer to record high levels and consumers are seeing higher oil prices drive up the cost of everything from food to clothing. I am pleased to be here today to discuss how our nation's ethanol industry is already helping to decrease our reliance on foreign oil and keep volatile gasoline prices in check, and how the industry is poised to make even more significant contributions in the future.

Background

The 109th Congress put our nation on a path toward greater energy diversity, enhanced national security, and increased economic activity when it passed the Energy Policy Act of 2005. That visionary and innovative legislation established the first-ever Renewable Fuels Standard (RFS) requiring the use of increasing volumes of domestically produced renewable fuels. Recognizing the early success of that program, the 110th Congress expanded the RFS to 36 billion gallons per year by 2022 when it passed the Energy Independence and Security Act (EISA). The 36 billion gallon RFS would virtually eliminate the need for foreign oil imported from OPEC nations, several of which are hostile to the United States and our way of life. EISA has stimulated unprecedented investment in the U.S. biofuels industry and, as a consequence, the U.S. now leads the world in the production and use of clean, renewable, domestic liquid transportation fuels.

Mr. Chairman and Members of the Committee, simply put, the RFS has worked. It has dramatically reduced our dependence on imported oil, created jobs and economic opportunity across rural America, and reduced gasoline prices at the pump.

Consider these facts. In 2005, when the RFS was adopted, the United States imported more than 60% of our crude oil and petroleum products. Today, in large part because of the RFS, we are just 45% dependent on crude oil imports. It is necessary to underscore that while increased domestic oil production and improved efficiency have played a part in that success as well, 81% of new motor fuel production from U.S. sources since 2005 has been ethanol. In other words, on a cumulative basis, ethanol has accounted for 8 out of every 10 new barrels of U.S.-produced liquid fuel since the RFS was first enacted in 2005. It is the RFS and U.S. produced ethanol, now the lowest cost motor fuel in the world, that has driven our nation toward a more secure energy future.

As the U.S. ethanol industry has grown, so too has the economic footprint it creates. In 2011, the 14 billion gallons of ethanol produced in this country supported more than 400,000 jobs, added $42 billion to GDP and added $30 billion to household income. This economic activity has revitalized rural communities all across the country, and has been one of the few bright spots in an otherwise dismal economy over the past several years.

Perhaps most importantly as consumers continue to face skyrocketing gasoline prices at the pump is that ethanol is LOWERING the price consumers pay for gasoline. There are two major factors. First, a gallon of ethanol is approximately $1 less expensive than a gallon of gasoline today, so when added at 10% volume, ethanol immediately lowers consumer costs by $0.10 per gallon, and obviously more when E15 is available. Moreover, because ethanol now represents 10% of the nation's gasoline supply, it is greatly reducing the amount of oil we import, which eases demand and lowers overall crude oil prices. The 14 billion gallons produced last year reduced U.S. oil imports by more than 480 million barrels. A study completed last year by economists at the University of Wisconsin and Iowa State University concluded that these combined effects lowered consumer gasoline prices by $0.89 per gallon!

Thus, I can say without hyperbole or reservation that the RFS has been the most successful energy policy this nation has ever implemented. It should be vigorously defended and maintained, and allowed to reach its full potential of 36 billion gallons of clean burning, renewable fuel.

The RFS is entering a critical period, however. The volumes of renewable fuel refiners are required to meet can no longer be met by just 10% ethanol. Greater volumes of ethanol and a greater diversity of biofuels and feedstocks will be necessary to meet the increasing volumes required by the RFS. Critically, these fuels will be attempting to enter the marketplace amidst a complicated regulatory structure that favors incumbent technologies and discourages market access. Gasoline marketers deserve the certainty that they will not be penalized for utilizing a new fuel or fuel blend that has been approved for use by the U.S. Environmental Protection Agency (EPA).

H.R. 4345, the Domestic Fuels Protection Act

The Domestic Fuels Protection Act of 2012 supports achievement of the RFS and facilitates the introduction of additional volumes of renewable fuel into the market by assuring that companies and business people don't feel the need to replace perfectly good underground equipment and above-ground dispensing apparatus to market renewable fuels. It also provides assurances to retailers that they won't be subjected to meritless lawsuits when they have abided EPA regulations.

In addressing both Federal and state regulations for new fuels and fuel blends, legacy regulations intended to prevent environmental damage from fossil fuels may not apply nor recognize non fossil fuels. Indeed, the current regulatory structure provides *no* pathway to certify existing equipment for anything other than fossil fuels, even when test data demonstrates its safety. The Domestic Fuels Protection Act allows EPA to create such a process, thereby providing new fuels access to the marketplace without having to expend time and resources on new infrastructure unnecessarily. The bill also bridges a gap between underground storage tanks and the fueling nozzle by providing EPA the authority require compatible equipment to be used for fuel blends and provides sound, technical pathways to determine "fit for purpose" criteria with existing fueling infrastructure.

The Domestic Fuels Protection Act rests on a simple premise: if a new fuel has been approved by EPA, if equipment used by retailers to store and dispense a new fuel meets specifications, and if retailers properly inform customers regarding the approved uses of a new fuel, then retailers, fuel producers, and other stakeholders should not have to be concerned about defending meritless lawsuits. The legislation is narrowly tailored to achieve this goal. It addresses only liability protection and does not alter the RFS or otherwise impact fuels that have been sanctioned by EPA as legal to offer for sale. Importantly, the legislation is *not* a prerequisite to the introduction into commerce of E15, which was approved by EPA after rigorous testing by the U.S. Department of Energy and others and which was recently registered as a legal fuel under the Clean Air Act.

The E15 experience does serve as a notable case study for why this legislation is needed, however. Prior to granting a waiver for the use of E15, EPA reviewed numerous tests demonstrating the efficacy of E15 on vehicles 2001 and newer. Because of the difficulty in testing older vehicles that had already exceeded their useful life, however, the only data on the record regarding older vehicles was an engineering assessment that concluded there would be no emissions, driveability or materials compatibility problems with older vehicles using E15. Thus, without actual test data and out of an abundance of caution, EPA allowed E15 to be used in only 2001 and newer vehicles. Bifurcating the vehicle fleet in this fashion has greatly complicated the commercialization of this new fuel blend. To prevent misfueling, EPA was compelled to create a very complicated labeling, registration, survey and public information program. Still, a retailer could do everything as proscribed by EPA and there could still be misfueling. While the RFA believes strongly there would be little or no consequence of such misfueling in vehicles, RFA also agrees fuel marketers should not be penalized when they have followed the regulatory guidance dictated by EPA. The Domestic Fuels Act provides that protection.

In summary, the RFA supports the Domestic Fuels Protection Act because it is consistent with the goals of promoting energy independence through the increased use of renewable fuels as outlined in the EISA. The Domestic Fuels Protection Act would eliminate technical barriers and speed the introduction of new fuels that can help decrease our nation's reliance on oil and lower gasoline prices.

Conclusion

The ethanol industry greatly appreciates the continued commitment of the 112th Congress and this Subcommittee to the further development of a robust and dynamic domestic renewable fuels industry. Chairman Shimkus, you have made clear your commitment to the hardworking men and woman across America who are today's newest energy producers. The RFA looks forward to working with you to further develop and implement sound policies that provide the proper incentives to grow the U.S. ethanol industry.

Thank you.

Mr. SHIMKUS. Now we would like to recognize Shannon Baker-Branstetter. You are recognized for 5 minutes.

STATEMENT OF SHANNON BAKER-BRANSTETTER

Ms. BAKER-BRANSTETTER. Thank you. I am pleased to be here today representing Consumers Union, the public policy and advocacy arm of Consumer Reports. My comments today are also supported by Consumer Federation of America.

Consumers Union opposes the Domestic Fuels Protection Act of 2012 because it would unfairly burden consumers by shifting the risks of fuel-related damage entirely onto consumers. This bill 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.

In addition, the bill provides sweeping immunity for a broad array of fuel-related damage to consumer equipment and underground storage tanks and any resulting leakage that can devastate drinking water supplies.

The State consumer protection law is still essential to protect consumers from marketing and selling fuels or additives in a manner that is likely to cause damage to consumers' vehicles and equipment, but this bill preempts these important State protections. EPA's approval of the 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.

EPA's approval does not imply that as product, the fuel or fuel additive will not pose other risks for consumer products. Immunizing fuel providers and vehicle and equipment manufactures from responsibility if something goes wrong, as this legislation would do, leaves consumers squeezed in the middle. If auto manufacturers are allowed to void warranties, and fuel providers are also immune from liability, consumers will be left to foot the bill for any damage caused by E15 or other fuels.

In the case of E15, Consumers Union does not believe that the EPA label on misfueling goes far enough to prevent consumers from unintentionally misfueling, and we are not alone in this belief. 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 on misfueling mitigation that despite the EPA label, consumers will misfuel, and the resulting damage could be significant.

That appears to be the reason behind the industry seeking immunity from liability. Unfortunately, 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.

Our organization does not want to encourage lawsuits, but we do want to encourage responsible behavior in marketing and informing consumers about E15 and selling transportation fuels more broadly. We hope shared responsibility will actually stave off lawsuits.

Some level of misfueling is inevitable, but fuel providers should do all they can to minimize misfueling and ensure the safety and suitability of fuels they bring to market. By sharing responsibility for the fuels they sell, fuel providers will be motivated to enhance safety, minimize consumer confusion, and help consumers select the proper fuel.

EPA labeling is useful and cost-effective, but it is not sufficient to prevent misfueling by consumers, with resulting damage to older vehicles and nonroad engines. Fuel providers 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. Fuel providers know their clientele best and can proactively help them avoid engine damage.

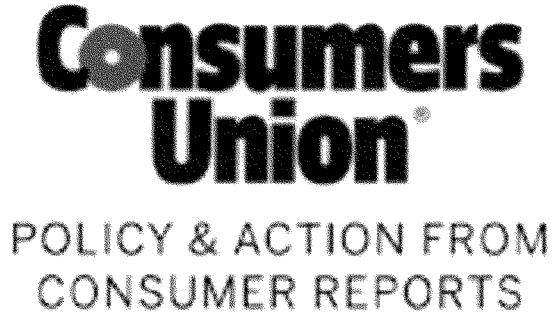
Consumers Union wants to encourage retailers to adopt local solutions to help reduce misfueling. Our suggestions include iconic labels on gas pumps to identify noncompatible products, dispenser prompts confirming E15 purchases, as well as separate dispensers for nonvehicle fueling. There are numerous other signage, outreach, and station configuration options that would help customers avoid misfueling, but the extension of immunity would likely undermine the incentive to maximize such measures.

In conclusion, E15 retailers, fuel providers, marketers, State and Federal regulatory agencies, and consumer protection offices should all work together to inform consumers of allowable uses as well as risks of E15. This bill shifts the risks and costs associated with E15 misfueling onto the shoulders of consumers and releases many industries from acting responsibly in marketing and selling transportation fuels.

Thank you for your attention to consumer concerns, and I am happy to answer any questions.

Mr. SHIMKUS. Thank you very much.

[The prepared statement of Ms. Baker-Branstetter follows:]



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 E15[4]

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.

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[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 Dispensivng 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.

Mr. SHIMKUS. Now I would like to recognize Mr. Brooks for 5 minutes.

STATEMENT OF K. ALLEN BROOKS

Mr. BROOKS. Thank you, Mr. Chairman. Thank you for allowing me to testify today on behalf of the Office of the Attorney General of the State of New Hampshire.

Before I begin my comments, I would like to specifically thank the chairman for his comments earlier about our existing MTBE case, and as reflected by Representative Bass, we do truly appreciate that. It has left me somewhat despondent because now I have a lot less to complain about, but I will do the best that I can in the time that I have.

When we do work together on making this bill something that we can live with, we are very concerned about section 4(a), as you may well imagine. We understand that the purpose as set forth today, and as reflected by some panel members, is to protect essentially those people who are innocent who are simply complying with the law from facing liability. We have no issue with that.

Anyone who is familiar with our MTBE lawsuits knows that we didn't sue any station owners. We didn't sue any convenience store owners. We were looking for redress from the people that we thought actually had a role and could have prevented the harm. In fact, it is our intention that a portion of whatever recovery we get go to actually help those convenience store owners clean up their property.

So we take no issue with that, but we do believe that the existing section 4(a) as written is too broad, and whether that is MTBE or maybe—whatever the next equivalent of MTBE is, that we do need to work on this. It doesn't appear to account for the behavior of the defendants in any particular case, and that is the troubling part. So again, I believe that with some work, through Representative Bass, perhaps we could address some of those issues, and I do appreciate that opportunity.

And with respect to our existing MTBE case, we do feel it has to be absolutely clear that it does not impact those types of litigation and perhaps our case specifically as one of the—probably one of the biggest in the Nation right now.

Section 4(b), which is what is called the safe harbor provision is also troubling, at least in its current form. It is not entirely clear what retroactive application this may or may not have, but any lack of clarity is a problem for us. When you have defendants that have significant means, they are able to raise any issue they possibly can, anything that becomes a source of delay to a small State like New Hampshire can be a considerable burden. We only have 1.3 million people. Our MTBE lawsuit alleges that 1,551 sites are currently contaminated with MTBE, 40,000 private wells are probably contaminated with MTBE, as well as hundreds of public water systems. The cost of that cleanup is hundreds of millions of dollars. That is hundreds of dollars for every man, woman, and child in New Hampshire. That can't be borne by the taxpayer.

Specifically, section 4(b) the safe harbor provision talks about that nothing that essentially is approved by EPA shall become a defective product. I understand, at least tacitly from what I can

gather, that maybe the focus of that is on strict liability claims, claims for people who haven't acted negligently, and specifically for the store owners and the lower station owners. And again, we don't necessarily have an issue with the store owners, but first of all, there are circumstances where the type of strict liability claim has merit, and someone who had the ability to efficiently resolve a problem is in a better position to face that type of liability.

But I would point out also that a defective product doesn't necessarily only apply in strict liability cases. There are negligence cases where you can say someone was negligent by introducing a defective product. It appears from the language that this may affect somehow those types of claims, and certainly we would want to work with you to make sure that that didn't happen, especially if that was an inadvertent consequence.

Briefly with respect to the USTs, New Hampshire has a very robust program for monitoring USTs. We have recently taken care of every above-ground storage tank in the State in terms of regulatory compliance, which was a massive undertaking. We are now focused on USTs, and I think that the State has done a very good job.

There are some things that we wonder under this bill whether New Hampshire can continue to do and just how broadly that immunity would sweep. For instance, I was alerted very recently that there are these things called yellow pipes, essentially connectors between UST tanks and other facilities. These tanks may have been approved by either EPA or UL at some point, they may have been compatible at the time they are in, but we have a program that monitors throughout time, so if in 20 years they are degraded, and we tell someone to fix it, we expect it to be fixed and not have someone come back and say, well, that is on the approved list, so go away. So that stands true for much of our program.

Again, we look forward to working with you on these issues, and I am sure we will be in contact with Representative Bass. And I really do appreciate the opportunity to speak today.

Mr. SHIMKUS. And we welcome you. So thank you.

[The prepared statement of Mr. Brooks follows:]

STATE OF NEW HAMPSHIRE

DATE: April 17, 2012

FROM: K. Allen Brooks KAB **AT (OFFICE)** Department of Justice
Senior Assistant Attorney General Environmental Protection Bureau

SUBJECT: Summary of Testimony from the State of New Hampshire, Office of the Attorney General on House Bill 4345

TO: Committee on Energy and Commerce, Subcommittee on Environment and the Economy

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Summary of Testimony

Senior Assistant Attorney General K. Allen Brooks will testify on behalf of the New Hampshire Office of the Attorney General. Attorney Brooks is Chief of the Environmental Protection Bureau at the N.H. Department of Justice, Office of the Attorney General.

Attorney Brooks will provide testimony on the following topics:

- The existence and nature of an existing State case against petroleum companies related to the fuel additive Methyl Tertiary Butyl Ether (MTBE);
- The comprehensive nature of the State's program to reduce the introduction of fuel contaminants to the environment and specifically groundwater;
- Concerns that the section of the bill dismissing all existing lawsuits could be used by some defendants to try to dismiss the State's existing case or other meritorious lawsuits;
- Concerns that the section of the bill providing a "safe harbor" for any approved product is overly broad and could have a negative impact on the State's existing case and all cases given its broad scope; and
- Concerns that the State's existing comprehensive program for management of Underground Storage Tanks (UST's) could be negatively impacted.

ATTORNEY GENERAL
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MICHAEL A. DELANEY
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

April 17, 2012

Congress of the United States
House of Representative
Committee on Energy and Commerce, Subcommittee on Environment and the Economy
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

RE: Testimony from the State of New Hampshire
Office of the Attorney General on House Bill 4345

Dear Commerce Committee on Energy and Commerce, Subcommittee on Environment and the Economy:

Thank you for allowing me to testify on behalf of the Office of the Attorney General for the State of New Hampshire on House Bill 4345. As you may know, since 2003, the State of New Hampshire has been actively litigating claims against various petroleum companies regarding the fuel additive MTBE. MTBE spreads faster, stays in the ground longer, and is harder and more expensive to clean than other fuel additives. Its introduction to the State's groundwater poses a health risk to the people of the State, nearly forty percent of whom rely on private wells for drinking water. Over the past nine years, the State's case has survived an exceptional number of legal challenges raised by the defendants, including multiple hearings in federal and state courts, as well as three appeals to the New Hampshire Supreme Court. Trial is finally scheduled to commence in state court on November 5th of this year.

In its suit, the State of New Hampshire alleges that the defendants violated various New Hampshire state laws, including the State's Consumer Protection Act and several common law

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requirements regarding product safety including a claim for the failure to warn of an inherently dangerous product. The State alleges that although some defendants knew of the insidious nature of MTBE as far back as 1984, they concealed that knowledge and publicly professed that the introduction of MTBE into the nation's gasoline supply would not pose an increased environmental risk. The State has uncovered evidence that certain defendants even misled the U.S. Environmental Protection Agency (EPA) about MTBE's increased propensity to result in widespread groundwater contamination. New Hampshire now has 1,551 sites known to be contaminated with MTBE. It is estimated that over 40,000 private wells and approximately 400 public water systems have been contaminated with MTBE. The cost to locate, treat, and monitor this widespread contamination amounts to hundreds of millions of dollars – a cost that, as of now, would be borne by the taxpayers of a State with a population of just 1.3 million people.

This case is only one aspect of the State's efforts to prevent the introduction of dangerous fuel additives to groundwater. The State has a robust regulatory program for Underground Storage Tanks (UST's) and has recently completed a comprehensive statewide effort that has successfully brought all of the State's Aboveground Storage Tanks (AST's) into compliance. The State has also created several funds that fairly distribute the costs of cleanup among fuel importers thereby providing protection for smaller station owners and innocent third parties. The State further regulates oil and gas terminals, including the implementation of contingency plans and spill response efforts, in coordination with relevant federal agencies.

We have significant concerns that the proposed legislation could be used to negatively impact our existing lawsuit and enforcement of our state's UST/AST program. First, the bill includes a provision for dismissal of any pending lawsuit without respect to the stage of the lawsuit, the culpability of defendants, or the egregiousness of the harm. The proposed legislation limits this provision to claims "resulting from the introduction of gasoline into motor vehicles or engines," ostensibly to provide comfort to small station owners or end users. We do not discourage reasonable measures designed to protect small businesses or end users. Indeed, our litigation was never directed at these entities because they do not possess either the knowledge or the means to prevent the harms for which we seek redress. However, given the sweeping nature of the immunity provided, we believe the petroleum company defendants will likely raise this immunity at every turn in an attempt to either dismiss or seriously curtail our groundwater contamination case. The specter of such immunity could provide even the most culpable violators with an avenue to argue that they cannot be responsible for violating states' common laws concerning defective products or statutes designed to guard against groundwater contamination.

Second, the proposed legislation provides a "safe harbor" provision stating that no product shall be considered a "defective product" if approved by the EPA. The effect of this language on pending litigation is not specified, which in itself creates further ambiguity. Regardless of its application, however, the broad prohibition against causes of action based upon allegedly defective products could prevent rightful recovery even where a defendant has intentionally introduced dangerous chemicals

into groundwater. The proposed legislation also fails to account for those times when EPA itself has been deceived – something the State of New Hampshire has alleged occurred with respect to MTBE. The "safe harbor" provision includes no limitation in its application. Essentially, it is a license for poor design and nondisclosure of potential harmful defects.

Finally, it is unclear to what extent the UST provisions of the bill could limit longstanding state regulation of underground tanks. New Hampshire currently requires several measures unrelated to a specific product, including frequent inspections and secondary containment measures. Without language specifically acknowledging the viability of these. programs, it is unclear whether some may claim that they fall under the rubric of "compatibility" and are, consequently, subject to preemption.

HB 4345 varies significantly from the majority of environmentally-focused legislation wherein state regulatory programs are allowed to be at least as stringent as the corresponding federal program. In addition, the legislation is bereft of a "savings clause," which preserves valid state rights or lawsuits that have already been filed at the time the legislation is enacted. The State of New Hampshire requests that it be given the opportunity to protect its natural resources and the health of its citizens.

Sincerely,

K. Allen Brooks
Senior Assistant Attorney General
Chief, Environmental Protection Bureau
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KAB

Mr. SHIMKUS. Now I would like to turn, as I mentioned earlier, to the Ranking Member of the full committee Mr. Waxman so he has time to do his 5-minute opening statement.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman, and I want to thank our witnesses today for their presentations. I know that, Mr. Chairman, you indicated that you are going to be changing some of the bill, we saw some of the drafting was flawed. And you particularly commented about changes in the MTBE area for contaminated drinking water supplies. I appreciate that, but I think that this bill is flawed beyond just the drafting. With all due respect, the flaws of this legislation would eliminate all recourse for communities that have lost their drinking water supply to MTBE contamination.

There are over 1,500 registered fuels and almost 7,500 registered fuel additives. This legislation would remove all liability for harm caused by these fuels and fuel additives.

Some of these additives are rarely used because the oil companies understand that they are powerful contaminants, and if they enter the groundwater, they can do harm. They can damage small engines. They can have an impact on public health. We don't know on this committee the facts for each of these 9,000 fuels and fuel additives. But under this bill, oil companies can now use them with impunity.

Consider ETBE, which has many of the same chemical characteristics that have made MTBE such a difficult contaminant to clean up. This bill would exempt oil companies liability from for ETBE contamination.

MMT is a fuel additive. It can severely damage engines and potentially endanger the public health. We should not eliminate liability from harm caused by MMT, but that is what this bill does.

MTBE rarely contaminates water by itself. It is usually part of an underground flume of gasoline from leaking underground storage tanks. If we remove the liability shield for MTBE, what about the other constituents in gasoline, such as benzene that can also contaminate a community's water supply?

I certainly welcome greater clarity from the Chairman on how he plans to modify the bill. But the point is, to have this Committee pick and choose among the 9,000 fuels and fuel additives, providing liability protections for some and not others, sounds like the ultimate case of government picking winners and losers.

If we exempt all of these 9,000 fuels and fuel additives, we are not picking winners and losers, except we are picking the losers. Because one point is for sure: that if we pass this law and absolve Exxon Mobil of any liability for selling unsafe, dangerous, or defective fuels, we will remove the incentive for responsible corporate behavior.

There are many other reasons why this legislation, I believe, is pretty bad.

Section 2 provides that if a convenience store owner determines that his or her underground storage tanks are compatible with the

fuel, then the owner is exempt from liability if leaks pollution—if his leaks pollute the neighbor's drinking water.

Section 3 says if someone sells you fuel that damages your car or destroys your boat engine, well, you are on your own.

Section 4 has a safe harbor provision for all fuels and fuel additives that is similar to the one that Representatives Barton and Bass proposed for MTBE in 2005. Safe harbor is for the future, but protected New Hampshire's lawsuit on MTBE when it was offered in 2005. It said other States couldn't engage in lawsuits. And then it adds a provision to throw out civil actions that are already in court. And on top of that, it prohibits even filing certain civil actions. Making it against the law to turn to the courts for justice runs contrary to our basic values.

I may be making some factually incorrect statements, because the Chairman is revising his bill, but the essence of this bill is to provide exemption from liability. and I am troubled by exempting from liability people who ought to be held accountable.

This is, I think, Washington at its worst. There are trade associations that couldn't agree on this bill. There are real challenges associated with implementing the renewable fuel standards mandated by Congress. But the only thing these trade associations could agree to is to shield themselves from any liability and shift the costs of harm from their product to the consumers or to the taxpayers. And this is not going to solve problems. It is only going to enhance our problems.

Mr. Chairman, I regret to say that I have such troubles with this bill. I still hold out the chance that we can work on a bipartisan basis on some of these issues like reauthorizing the Safe Drinking Water Acts State of Revolving Loan Fund. That needs to be reauthorized. It should be done in a bipartisan manner.

I am disappointed that we have gone in the opposite direction with this legislation. Rather than working to ensure our communities have safe and affordable drinking water, we are considering legislation to allow oil companies and others to pollute groundwater with impunity. That is very disturbing to me, and I hope that my worst fears are not going to be realized.

I yield back my time.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I always say that elected officials need to take big doses of humble pie and humility, and you continue to offer me a humble position, and that is a healthy thing in our process. So I am glad we got you to put in your opening statement.

I would like to recognize myself for 5 minutes for questions. Mr. Brooks, I do appreciate this. You know, we haven't really talked MTBE in this committee in a long time, so I think your concerns took a lot of us by surprise. So with respect to that—and that is why you have hearings. We have hearings to address concerns, get input, and try to adjust legislation, because it is really in the intent to move something forward to really—if the Environmental Protection Agency and Federal policy, which we passed not just in the 2005 energy bill, but we expanded it in 2007. 2005, the Republicans were in majority. 2007, Democrats were in the majority. And we have continued to move the RFS forward, which is the national policy, so a legal fuel being administered by a local retailer may be

a family owned—I mean, the major premise is they shouldn't be harmed by doing what the law is forcing them to do.

But if you could help provide us summaries of your claims in the State actions on MTBE and underground storage tanks so we can exactly see what the basis of the lawsuits are, we would appreciate that. I think that would help us.

Also, if you could summarize the defendants' responses, that would help us in trying to go back to our legislative counsel to try to address these concerns. Would you be willing to do that as we move this legislation forward?

Mr. BROOKS. Yes, Mr. Chairman. Would you like me to do that now, or just to work with Representative Bass and others on that?

Mr. SHIMKUS. You can work with the committee and Representative Bass, and that would be helpful.

Most people should know that we have just been called for votes. Of course, we have got 15 minutes to get to the first vote. We would like to get through at least my opening questions, maybe Mr. Green's, and then we will then adjourn and come back, and we will have plenty of time to finish up afterwards.

This question is to Mr. Eichberger, Mr. Drevna and Mr. Dinneen. Do you think that this legislation prevents Federal agencies besides the EPA from issuing or enforcing regulations?

Mr. EICHBERGER. I do not, Mr. Chairman. I think the legislation basically sets a precedent that as long as we are complying with the regulations that are applicable, then we have some reasonable protections under law.

Mr. SHIMKUS. Mr. Drevna?

Mr. DREVNA. I agree with Mr. Eichberger, but the thing is we have to make sure that those regulations are tested. We have to make sure the fuels are tested. We have to make sure there is consumer protection before entering into any marketplace.

Mr. SHIMKUS. And Mr. Dinneen?

Mr. DINNEEN. I agree that with the assessment that this does not prevent other agencies from implementing new regulations.

Mr. SHIMKUS. Does it affect OSHA in their involvement in safety and health issues?

Mr. EICHBERGER. No.

Mr. SHIMKUS. Mr. Drevna?

Mr. DREVNA. No.

Mr. SHIMKUS. Mr. Dinneen?

Mr. DINNEEN. Let the record show that Charlie and I agreed again.

Mr. SHIMKUS. It is a scary day.

What about the Consumer Product Safety Commission? Does this legislation affect any actions that the Consumer Product Safety Commission might be involved with?

Mr. EICHBERGER. Not to my knowledge, no.

Mr. SHIMKUS. Mr. Drevna?

Mr. DREVNA. Not in my reading of the bill, sir.

Mr. SHIMKUS. Mr. Dinneen?

Mr. DINNEEN. No, sir.

Mr. SHIMKUS. Ms. Baker-Branstetter, do you agree with those summaries of not impacting Federal regulatory agencies to do the job that they are required to do, and CERCLA, RCRA, and all of

the other Federal laws and rules we have to protect the health of the public?

Ms. BAKER-BRANSTETTER. I can't speak to all of the environmental laws that you mentioned, but I do agree about OSHA and the other Federal agencies that you mentioned, although the Consumer Product Safety Commission may see increased recalls, as they have already, with E10 for some of the nonroad engines.

Mr. SHIMKUS. But that would be actually a statement in support that we are not depriving the Consumer Product Safety Commission of their part in evaluating the market.

Ms. BAKER-BRANSTETTER. I am not aware there is any impaction.

Mr. SHIMKUS. Great, thank you.

I have got 47 seconds. Mr. Dinneen, you say in your statement that the current regulatory structure provides no pathway to certifying existing equipment for anything other than fossil fuels even when test data demonstrates its safety. Can you elaborate on that?

Mr. DINNEEN. Right now, if you have got an underground storage tank, and a new fuel is coming into the marketplace, or a new fuel blend like E15, Underwriters Laboratory does not recertify existing equipment. So even if you were to go and you were to demonstrate that there is a plethora of scientific evidence suggesting that there is no safety issue here, you cannot meet the regulatory burden. This bill provides a pathway to do that.

Mr. SHIMKUS. Yes, and if former Speaker Hastert couldn't get UL to at least address this issue, how can anyone do that?

So I thank you. I yield back my time, and I recognize Mr. Green for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. I apologize. Having known Mr. Drevna for many years and worked with him, I will not refer to you as Charlie.

But let me clear up something before I ask questions. In your testimony you compare the immunity protection in this bill to protections afforded to pharmaceutical companies for vaccines; however, the National Vaccine Injury Compensation Program did not eliminate the liability. It created a no-fault system for patients injured by vaccines. So to be clear, it is a guarantee to injured people, the right to some recourse, unlike this bill which provides nothing to injured consumers. I think we are comparing apples and oranges, or maybe even apples and refined products.

Mr. DREVNA. Well, I think, Mr. Green, we have to be certain that when a fuel or fuel additive has entered into the marketplace, it affords the same protections to everyone. It affords the same protections to the consumer, whether it is a 1995 automobile or a 2011 automobile. It affords the same protection to an off-road vehicle, a handheld power equipment, a motorboat, or a snowmobile.

In the testimony we compare it to that in the fact that the pharmaceutical folks have a series of things they go through, and that particular thing is absolutely government approved. Now, it may have something else in the marketplace, or some—an individual kind of reaction. What we are looking at is stop the bifurcation, stop the trifurcation of EPA, and make sure that all equipment is safe to use E15 or higher blends safely for all concerned. That is what we are talking about here.

Mr. GREEN. I know, but there is a difference between what we did with pharmaceutical and vaccine immunizations and what the bill does. I would like this bill to do what we did for the pharmaceutical industry, because, believe me, I want not only refiners—and I am proud to represent five of them—but also my retail outlets, because you are doing what the EPA tells you to do, and you shouldn't be held liable, but there ought to be someone there, and the Federal Government ought to be the one doing it.

Mr. DREVNA. Well, I can agree. I think we can agree the ultimate goal here is to protect the consumer. We are not trying to make an end run around any consumer. We are trying to protect the consumer.

Mr. GREEN. A consumer with a 2000 vehicle shows up at a station and fuels, and that fuel is bad because it doesn't fit that particular engine, you have to admit—you know I am not a big fan of E15, and Mr. Dinneen understands that.

But be that as it may, I understand refiners and retailers are concerned about the liability and damage from E15, and I share your concern. That is why we have cosponsored—I have cosponsored a bill that—523, which was introduced by Mr. Gonzalez. As I mentioned in my statement, it is the use of renewable fuels mandated by Federal Law 523 says, the government should be responsible for any liability, and 523 is targeted for that response.

But the bill before us today is entirely different. It goes far beyond just E15. It goes far beyond harm to equipment and engines and lets individuals end up absorbing the cost.

Ms. Baker-Branstetter, what are some of the problems that vehicle or equipment owners may experience with E15?

Ms. BAKER-BRANSTETTER. Well, in the nonroad engines, lawn mowers, trimmers, anything that requires gasoline, there could be corrosion in the gas tank.

Mr. GREEN. I bought a new motor at Sears last month. That is a new lawn mower. It could not use E15 even though it was bought in 2012.

Ms. BAKER-BRANSTETTER. Right. EPA has not approved for use in that appliance.

Mr. GREEN. So we are going to have to be able to buy our gas somewhere else from another pump from one of the convenience stores?

Ms. BAKER-BRANSTETTER. Yes. It is very expensive to buy pure gasoline. Sears does sell it, but it is about $24 and up per gallon.

Mr. GREEN. But we can use E10 now in our lawn mowers?

Ms. BAKER-BRANSTETTER. Correct.

Mr. DINNEEN. I think that is an important point. Small engines do certify and warranty E10 in most of those vehicles, and an important distinction, E15 is not being mandated. It could be an option for those consumers that have a 2001 or newer vehicle and want to use it because it is appropriate for their——

Mr. GREEN. So are we going to be able to have an E10 and E15 pump at the convenience stores? Is that really possible?

Mr. EICHBERGER. It is most likely that you are only going to have a few markets where E15 is even going to be available.

Mr. GREEN. Well, I will give you an example with only 30 seconds left. The only place that I can find anything but E10 in my

district is at a Kroger store, and that is because GM made an agreement with them to market ethanol. But in my area it is really difficult to find ethanol, even though I drive a flex-fuel vehicle. And so that is my problem, because we are an oil and gas area, and, you know, it is just difficult to get the renewables.

Now, we can debate MTBE all day, because I lost that battle in 2005, but we used to make MTBE in our district. Now, we still make it for export, but not near as much as we used to.

But, Mr. Chairman, I know I am— I would love to, but I am running out of time; in fact, I am over time.

Mr. SHIMKUS. The gentleman's time is expired. You are welcome to southern Illinois. I will show you where all of my E85 stations are, and we will get past the E15 debate.

Mr. GREEN. And I will take you to any refinery I have got.

Mr. SHIMKUS. So we are going to recess this hearing, and we have three votes on the floor, which means, what, about an hour, 45 minutes to an hour. So you can take a break, stretch your legs, get some coffee, and we will reconvene after votes. The hearing is recessed.

[Recess.]

Mr. SHIMKUS. If everyone could take their seats. The great high-tech committee. I don't care, I don't need it. We will call the hearing back to order, and I would now like to recognize Mr. Whitfield for 5 minutes.

Mr. WHITFIELD. Thank you very much. And I also would like to thank all of you for coming and testifying on this legislation today.

I was listening to your opening statements and the comments made by Ms. Branstetter, and Henry Waxman and others. So we find ourselves in a situation where we have this Federal mandate on the renewable fuel standard. We have EPA with responsibility of administering the renewable fuel standard. We have EPA issuing regulations to mitigate liability in certain situations. And yet, as Ms. Branstetter pointed out, we do have a situation where cars that are older than a certain year, you can't put E15 in it without damage. And small engines, and lawn mowers, and so forth, we have that—so we have this liability problem. We have a liability problem where people, through no fault of their own, can accidentally have this fuel put in, and they are going to suffer some damages because of it. So then the question becomes, well, who really is responsible for that? And in some ways you can say, you know what, the Federal Government should be responsible for it.

So I just want to toss out a thought that I had which may not have any merit at all, but under the Clean Air Act, before they had the Equal Access to Justice Act, which, as you know, under the Equal Access to Justice Act, the legal fees are paid by certain plaintiffs who bring actions under the Clean Area Act, and then also the Equal Access to Justice Act actually pays some of the damages in some situations.

So you could almost make an argument here that we could extend the ability to have access to the Equal Access to Justice Act under the Clean Air Act for people who end up suffering damages because of this Federal mandate because of Federal regulations, and through no fault of their own, they end up suffering damages for their motors, for their vehicles. And I was just—this may be so

off the wall, but I will just ask you if you have any comments on that or thoughts on that?

Now, John Shimkus and I, Mr. Chairman Shimkus and I, and others have really been upset about the Equal Access to Justice Act because it lacks transparency. We never really know how much money is being paid out. But if there was ever a time—I mean, most of that money goes to environmental groups and others who want to enforce the Clean Air Act when they think EPA is not enforcing it. Here we have a situation where you have citizens suffering damages that they had no responsibility for whatsoever, and why should they not have access to that fund? So do you all have any thoughts on that?

Mr. DINNEEN. Congressman, I will wade into it, because I don't hear anybody else stepping up.

I am not an expert on the Equal Access to Justice Act, but in terms of the premise of your question, and I can't speak for other fuels or fuel additives——

Mr. WHITFIELD. Yes.

Mr. DINNEEN [continuing]. But at least with respect to E15, I don't think that there is any data anywhere that would suggest that one act of misfueling E15 into a pre-2001 vehicle is going to cause damage.

Mr. WHITFIELD. OK.

Mr. DINNEEN. EPA took the action that they did, I believe, in an abundance of caution, because there wasn't sufficient data out there for older vehicles. It is real hard to test over the useful life of an engine a fuel in a vehicle that is that old. You can't find vehicles to test.

Mr. WHITFIELD. Yes.

Mr. DINNEEN. And so they didn't have appropriate test data. Now, higher blends of ethanol than E15 are used elsewhere in the world with no problems whatsoever.

Mr. WHITFIELD. OK.

Mr. DINNEEN. Brazil, as everybody knows, uses a blend of E25.

Mr. WHITFIELD. OK.

Mr. DINNEEN. So I don't think that one act of misfueling, anybody would suggest, would cause damage that anybody would have to seek redress for.

Mr. WHITFIELD. Well, I am certainly no expert on it. I was just reading Ms. Branstetter's testimony, and I sort of came to that conclusion.

So anybody else have any comments? Yes.

Mr. DREVNA. Mr. Whitfield, again, I am no expert on that provision or that particular act. I think the focus as this—as the bill we are talking about today is focused on not only, you know, protecting the supply chain from lawsuits——

Mr. WHITFIELD. Right.

Mr. DREVNA [continuing]. But I think we should also be focused on protecting the consumer. And I guess our—my agreement or Mr. Dinneen's agreement with me has been short-lived, but——

Mr. SHIMKUS. Not surprising.

Mr. DREVNA. You know, there is a reason why Congressman Sensenbrenner had letters delivered to him by the automakers. And I think we are letting the theory go. I think it has to be addressed.

You know, we are talking about 2000 vehicles backwards, 1999—whatever. I agree, there are not that many out there. But there is a reason why those automobile manufacturers said they will not warranty anything over E10. There is a reason why the marine manufacturers say they will not warranty anything over E10. There is a reason why the outdoor power equipment people say they will not warranty anything over E10.

So, I mean, you know, there is a—it is not because they are trying to, you know, void any warranties; it is because they are trying to tell the consumer, be careful, let us not do this. We haven't had enough testing on this stuff yet.

So yes, we fully support this bill. And as long—as I said earlier, as long as the RFS with its ever-increasing mandates for increased renewables blended into gasoline is the law of the land, that I believe just not—just not only refiners, but everyone down the supply chain has to be protected.

But I also believe that the consumer ultimately has to be protected, and it can't be on some four-by-four little thing on a pump that says—I mean, I am quite surprised at EPA itself that—when in the history of EPA has compliance with a major environmental law ever been placed on the consumer? And that is what they are doing.

Mr. EICHBERGER. If I can make one quick comment. I don't know anything about the Equal Access to Justice Act, but this legislation is not talking about the procedures that EPA goes through to set certain rules. If we want to talk about EPA not doing what they are supposed to do, that is a different topic. Right now we have a process in place. We have rulemaking. We have comments. There were—I don't think the three of us agreed on what the misfueling label mitigation measure should be for E15. EPA made a decision. If we don't like the decision process, let us talk about that at another forum, but once a decision is made, we have to have something to rely upon. We have to be able to live under the rule of law, and that is what we have right now.

Mr. SHIMKUS. The gentleman's time is expired. Now I will now just take a brief second.

You know, the whole diesel story I gave as a prelude, you can't do that anymore, because they have retrofitted the nozzles. And the reason why I know that is I was about to do it one time. Here I was blaming staff; now I—and the system caught me. So now I would like to recognize Mr. Latta for 5 minutes.

Mr. LATTA. Well, thank you, Mr. Chairman. Actually, that is leading right into my question, about your situation with that diesel. And, you know, late at night, as Members of Congress are at home, we put a lot of fuel in our cars, and there is one time I actually picked up the diesel nozzle, and I looked at the ends and said, well, at least I couldn't have put it into the car at that time, or I would have been in big trouble like you had a while back.

But if I could ask Mr. Eichberger this question: How common is it for people to maybe misfuel when they are at a pump?

Mr. EICHBERGER. Well, right now there is not a whole lot of that happening because most dispensers have three grades of gasoline. The dispensers are usually on a different nozzle, a different nozzle size, sometimes a different dispenser completely. E85 is typically at

a different dispenser and very clearly marked and labeled. Right now we don't have a whole lot of incidents of that occurring.

Mr. LATTA. Let me follow up then. Do you believe that the posting of the legally required notices would deter a lot of people from using the wrong fuel when they are at the pump?

Mr. EICHBERGER. It will deter some. It really is going to come down to what is the price differential. And unfortunately, consumers are sometimes willing to take risks with their vehicles in order to save a couple of pennies at the pump.

The decal requirement—and keep in mind this decal is about one and a half times bigger than any other decal identifying fuel identity on the dispenser—has to be put right onto the selector area, so you will see it. You cannot push an E15 button without seeing an E15 sign. So you are going to be well informed. Some people will say, you know what? It is 5 cents cheaper, I am doing it anyway. And that is just the reality of it.

Consumers—when we were going from lead to unleaded, leaded gasoline was less expensive. We had nozzle size restrictions like on diesel fuel. People took can openers and pried open their fill pipes, or stuck funnels in their cars to put unleaded fuel in theirleaded cars—or leaded fuel in their unleaded cars. EPA fined retailers for that action. That is why we are so concerned.

No matter what EPA does in terms of misfueling, a consumer who wants to misfuel will find a way to misfuel, and the retailer cannot prevent that independent action, just like we couldn't prevent people from manipulating their vehicles in the 1980s to put leaded fuel in unleaded cars.

Mr. SHIMKUS. Will the gentleman yield for 1 second?

Mr. LATTA. I yield to the chairman.

Mr. SHIMKUS. Just to make a point, we have the 85 pumps all over southern Illinois. You do have individual citizens mixing at the retail location. So they may fill half their tank up with E85 and then the other half with regular gasoline. So that then what is the litigation issue there, and who is blamed for a process when it was the individualconsumer's conscious decision to mix at the pump? And that is kind of part of the reason why we have been talking about this.

Mr. LATTA. Well, thank you. Just to kind of continue on that line of questioning, you know, what equipment would have to be replaced? We are talking about, you know, most of the pumps I see you have got three grades of gasoline, without—if you don't have the ethanol right there, or diesel, you have one, two, three. And if you are talking about another, you know, with the E15, I assume you would have to have put in another pump, and then you would have to put in more tanks? Could you fill me in on that?

Mr. EICHBERGER. Well, each retailer will have to decide how they want to configure their station, assuming the equipment is compatible, and that is a big assumption, assuming you have compatible equipment. Most retail stations have two underground storage tanks, a regular and premium. We blend through the dispenser in a blender pump to give you midgrade.

In order to offer an E85 or an E15 mix, we would probably have to—we would have to dedicate one of those tanks to either an E85 or a higher-grade ethanol blend in order to get that product. That

would likely lead to us reducing our overall gasoline offer by a full grade, unless we have room to put in another tank. Now, there are some places where you don't have the room, you can't get the permitting. Putting in a tank is expensive. There is a retailer in California that wanted to put in a diesel tank. It is going to be $200,000 just to put in a 6,000-gallon tank. So you look at retailers that are making $35- and $40,000 in pretax profit, $200,000 for installation is a pretty hefty bill to pick up.

Mr. LATTA. You know, and also just follow-up with my last 39 seconds here, without the legislation, who would be liable pretty much if an individual puts that incompatible fuel in their—you know, that is a big concern out there.

Mr. EICHBERGER. Under the Clean Air Act, the retailer could be find $37,500 per day for each incident for allowing the consumer to do that. And so the liability could fall directly on the retailer for the independent action on the consumer.

Mr. LATTA. Thank you, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes my colleague from California Mrs. Capps for 5 minutes.

Mrs. CAPPS. Thank you, Mr. Chairman. And thank you, each of you, for your presence here today and your testimony.

In my congressional district and across the country, the effects of MTBE contamination have been significant. Cities like Cambria and Oxnard on the central cost of California have lost their public water supply sources, and homeowners have lost their private wells. And so many have learned through personal experience when fuel containing MTBE leaks from an underground storage tank, the chemical travels quickly through the soil into sources of drinking water. It makes the water foul-tasting and undrinkable. Studies suggest that it causes cancer.

It is very expensive to clean up. According to drinking water utilities, the total cost to clean up MTBE contamination of public water systems in this country could be as high at $85 billion. Cities and towns in my district are still seeking to recover their cleanup costs from the oil companies that caused the contamination. If this legislation passes, its liability shield will halt those lawsuits, and leave these communities, some in my district, with MTBE-contaminated water supply stranded with billions of dollars in cleanup costs while the companies that created and distributed the product may pay little or nothing at all.

Mr. Brooks, I would like to direct a few questions to you. Can you tell me about the costs and difficulties your State of New Hampshire has faced with MTBE contamination?

Mr. BROOKS. Thank you, Representative Capps, for your question. It has been a significant concern. Again, our lawsuit alleges that to actually find and clean up all of the MTBE in the States, we are talking easily in the hundreds of millions of dollars. Already, through various funding mechanisms, we have spent—depends on your estimate, but overall for gasoline, hundreds of millions of dollars and a significant portion of that for MTBE.

As you said, MTBE costs more to clean up than other contaminants. It travels faster, stays longer, and it costs more money. So we have additional costs, and these costs aren't going to go away soon because it is a long-lived contaminant.

In New Hampshire, we have different kinds of aquifers. We have some stratified aquifers, which is essentially sand, but we also have a lot of bedrock with fractures. MTBE gets in a fracture, and you cannot tell where it is or where it is going for many, many years, and it will still be there. So we are talking about a significant cost.

Mrs. CAPPS. Do you believe that New Hampshire citizens should bear these costs of cleaning up pollution?

Mr. BROOKS. No, and I was gratified to hear that it seems to be a fundamental theme of many people on the committee that people who are harmed need redress. And that is a fundamental principle for us as well is that someone who has done nothing wrong. We talked about some instances of someone who puts fuel in their tank, you know, possibly having some behavior or warranty voided or something like that, and that is certainly a concern. We have many instances where the person wasn't involved at all. They are a homeowner. They might be several hundred feet away or more from a convenience store. Their property, their home, which is something that is we consider sacred in New Hampshire and other places, has been affected, and they have—they need to have redress.

Mrs. CAPPS. New Hampshire, you know, is not alone in its concern about this legislation. The Association of California Water Agencies is very concerned about this bill and has sent a letter asking us—and I think it has already been held up by our ranking member—asking us to ensure that these lawsuits are not dismissed. As they point out, this bill will further strain communities already struggling with the cost to repair aging drinking water infrastructure and further burden ratepayers in those communities. Do you agree, Mr. Brooks?

Mr. BROOKS. Yes.

Mrs. CAPPS. The California water agencies ask us, and I am quoting now, "to ensure that no local community or drinking water system will be left without the ability to recover costs associated with remediating MTBE or other similar contaminations of drinking water sources."

Is that a position with which you would agree, and perhaps you speaking on behalf of the State of New Hampshire?

Mr. BROOKS. We do. And it is very important for a State like New Hampshire that has a rural character. We have only 1.3 million people; 200,000 private wells supply drinking water to people of New Hampshire. Those people don't have the ability to spend a lot of money to clean things up, and certainly don't have the ability even sometimes to sue for redress. So it is very significant that that type of community has the ability to do what they need to do.

Mrs. CAPPS. Thank you.

We have already heard today that this legislation will be redrafted so that it is no longer a liability shield for MTBE. If this bill is amended so that MTBE is not covered, will you still be concerned about your State's ability to recover costs when contamination from other fuels, the next MTBE, if you will, and fuel additives occur in the future?

Mr. BROOKS. We will be concerned any time where someone has been harmed, especially wrongfully, by the conduct of another

party where they could not seek redress. So we would want to make sure that someone has some means for compensation if actually they have been harmed.

Mrs. CAPPS. Thank you.

I share these concerns, and I urge this committee to heed the request of those water agencies to make sure that communities are not left without the ability to recover costs when polluters contaminate their water supply.

I yield back.

Mr. SHIMKUS. The gentlelady yields back her time.

Seeing no other Members, I can ask, Mr. Green, do you have anything else you want to add?

Mr. GREEN. Mr. Chairman, we could probably talk all day, and let Charlie and Bob talk, too, and—but I appreciate you doing this legislative hearing. I know we were just talking, and I said it publicly, there is a solution. We need to do this for both the refiners and our retailers, and hopefully we can work together and come up with a plan.

Mr. SHIMKUS. Seeing no other Members, this hearing is adjourned.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

LETTERS AND STATEMENTS OPPOSING H.R. 4345

- AAA
- ActionAid USA
- ACWA, the Association of California Water Agencies
- Alliance for Justice
- American Bakers
- American Meat Institute
- Americans for Limited Government
- Americans for Prosperity
- AMWA, the Association of Metropolitan Water Agencies
- AWWA, the American Water Works Association
- Boat U.S.: Boat Owners Association of the United States
- California Dairy Campaign
- CASA, the California Association of Sanitation Agencies
- Center for Auto Safety
- Center for Justice and Democracy
- City of New York
- Clean Air Task Force
- Clean Water Action
- Competitive Enterprise Institute
- EarthJustice
- Environment America
- Environmental Working Group
- Freedom Action
- Friends of the Earth
- Greenpeace
- Grocery Manufacturers Association
- Milk Producers Council
- National Audubon Society
- National Black Chamber of Commerce
- National Chicken Council
- National Consumers League
- National Council of Chain Restaurants
- National Meat Association
- National Taxpayers Union
- National Turkey Federation
- Natural Resources Defense Council
- NRWA, the National Rural Water Association
- Our Children's Earth Foundation
- Oxfam America
- Public Citizen
- Sierra Club
- Southeast Milk Inc.
- Southern Environmental Law Center
- Taxpayers for Common Sense
- U.S. PIRG
- Underwriters Laboratories, Inc.

Prepared by the House Committee on Energy and Commerce, Democratic Staff

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April 18, 2012

The Honorable John M. Shimkus
Chairman

The Honorable Gene Green
Ranking Member

United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
2322A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Shimkus and Ranking Member Green:

AAA is a not-for-profit federation of motor clubs providing services to more than 53 million members in the U.S. and Canada. AAA is committed to serving these members in all aspects of automobile ownership, including nationwide emergency roadside service, gas price monitoring, vehicle care information, and dedication to operator and passenger safety. I am writing to express AAA's concerns about the impact H.R. 4345, "The Domestic Fuels Protection Act of 2012" would have on AAA members and all motorists.

As legislation and regulation surrounding the sale of fuels — including increasing the permissible ethanol content from the current ten percent to fifteen percent — has been proposed, AAA has consistently expressed concerns with the potential consequences these changes might have on consumers. Vehicle manufacturers and the petroleum industry have expressed concern regarding accelerated wear and failure of engine systems that could result with an increased ethanol content. To this end, AAA has significant concerns with H.R. 4345, which would exempt from liability those who produce, distribute and dispense various fuels, while leaving consumers to bear the full consequences of any damages that result from the use of these fuels.

AAA opposes H.R. 4345 and urges you not to protect the interests of those in the fuel supply chain by unfairly shifting the burden to American motorists.

Sincerely,

Jill Ingrassia
Managing Director, Government Relations and Traffic Safety Advocacy

Cc: Members of the United States House of Representatives, Committee on Energy and Commerce, Subcommittee on Environment and the Economy

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April 17, 2012

The Honorable Fred Upton, Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Re: H.R. 4345, The Domestic Fuels Protection Act of 2012

Dear Chairman Upton:

BoatU.S. is the largest organization of recreational boaters in the United States, with more than 500,000 members, each owning an average of two boats. Recreational boating is a significant contributor to our nation's economy and society. In 2010, boats generated $30.4 billion of economic activity and supported nearly 300,000 American jobs. That same year, an estimated 75 million people spent time on a recreational boat, making this one of our nation's favorite recreational activities.

We have reviewed H.R. 4345, the Domestic Fuels Protection Act of 2012, and have concerns with several of its provisions. With the increasing likelihood that gasoline with ethanol content of up to 15% (E15) will be introduced into the fuel supply, this legislation would remove crucial protections for boating consumers. We urge you to reject this bill.

When the Environmental Protection Agency granted a partial waiver for the use of E15 only in 2001 and new cars and light trucks, it specifically banned its use in all boat and other off-road engines. Nevertheless, with E15 heading to gas pumps, BoatU.S. has a number of concerns that mis-fueling of boat engines will occur. In response to a 2010 EPA request for suggestions on how to prevent mis-fueling, BoatU.S. noted the following:

> "*Boats are fueled in a variety of places and ways. Some boats on trailers are towed to gas stations, and are filled up at the same time as the cars/trucks towing them. Larger boats are typically filled while floating in the water at a marine gas dock. Small dinghies and runabouts may use a small portable fuel tank, which is taken off the boat and carried to the gas station to fill, or is filled from the 5 gallon container in the garage that is used for lawn mowers, leaf blowers, and other small engines around the home. With such diversity in filling scenarios, there is no "one size fits all" answer to ensure proper fueling.*"

Given the wide variety of methods used to fuel boats, it would be patently unfair to give a blanket exemption from liability for the responsible parties in the fuel supply chain, as proscribed in H.R. 4345.

For a number of years our members have experienced significant problems resulting from ethanol in gasoline, even at the currently 10% maximum permitted level. The chemical characteristics of ethanol make it a less than desirable fuel component in the marine environment and in engines that are not used daily. Ethanol readily absorbs water and is incompatible with many boat fuel system components. Thousands of boaters have faced significant — and expensive — problems, some leading to complete engine and/or fuel tank failure. Now, as E15 is poised to enter the marketplace, boaters are counting on the suppliers of fuel to dispense a product that will not damage their engines, void their warranties and potentially put them at safety risk from mechanical failures on the water. Should H.R. 4345 become law, exempting members of the fuel supply chain from liability, it will only serve to remove all incentive for suppliers to help prevent the inadvertent use of E15.

The only measure to prevent mis-fueling currently required is a label affixed on retail fuel pumps, a wholly inadequate scheme. There is no assurance such labels will always be in place or even remain legible, nor that they will be understood by consumers. Indeed, we have significant concerns that all fuel consumers, boaters among them, will be confused or led into inadvertently using E15 when fueling. Legislation that would absolve fuel retailers of any responsibility for taking even minor precautions is unacceptable. Should mis-fueling occur, resulting in engine and/or fuel system damage, boating consumers would have no recourse.

The proponents of E15 have suggested it is a safe fuel and will be compatible with much of the current fueling infrastructure. It is questionable, then, why this legislation is needed at all. Consumers should be provided the same protections from harm that they currently enjoy with fuels already in the marketplace.

We recognize that renewable fuels such as ethanol will be part of the energy mix for the foreseeable future. As E15 is introduced into commerce, however, boaters must be assured that safe, compatible fuels are available. We also expect fuel providers to stand behind their products. H.R. 4345 will not further these objectives and should be rejected.

Thank you for your attention to our concerns. Please let us know if we can be of assistance with this or any other issues that impact recreational boating.

Sincerely,

Margaret B. Podlich

Margaret B. Podlich
President

Cc: The Honorable Henry Waxman

The Honorable John Shimkus

The Honorable Gene Green

House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building

April 19, 2012

Dear Congress Person,

The undersigned diverse group of business associations, consumer protection organizations, hunger and development organizations, agricultural groups, environmental groups, budget hawks, grassroots groups and free marketers urge you to oppose the Domestic Fuels Act of 2012. The Domestic Fuels Act would provide liability protection for retailers, engine manufacturers and fuel producers for any problems that occur as a result of using 15% ethanol in engine fuel (E15), a mix recently approved for use by the Environmental Protection Agency (EPA). This bill would leave consumers and taxpayers vulnerable to the potential damages and costs incurred on their engines, public safety, health, and the environment associated with using E15. The ultimate protection for businesses and consumers alike would be to slow the process of moving towards E15 until all of the potential harmful impacts have been addressed.

There has yet to be a thorough analysis of the environmental and economic impacts of increasing the amount of allowable ethanol content in gasoline to 15% (E15). In fact, Congress and the Government Accountability Office (GAO) already agree that more testing and research is needed before E15 is ready for the marketplace. On February 19, 2011, 285 members of Congress supported this exact measure as amendment to H.R. 1.[1] In 2011 the GAO issued a report identifying several health, safety, cost, and environmental issues that warrant additional study in relation to mid-level ethanol blends.[2] In addition, a report from the National Renewable Energy Laboratory (NREL) raised fundamental concerns regarding the use of E15 in marine engines.[3]

A move to higher blends of ethanol with gas could also produce another demand shock to our corn market. This demand shock could cause food prices to spike at home and abroad. Biofuels expansion in general, and U.S. corn ethanol expansion in particular, are widely seen as one of the main contributors to the recent surge in global food prices.[4] With food and gas prices climbing, we need to proceed with caution to ensure that we don't continue to subsidize or expand the market for corn ethanol, which could raise food prices, threaten the health and safety of our citizens and the environment, and do so with huge costs to the taxpayer and consumer.

The undersigned groups have varied views on the overall issue of providing liability protection for a given industry or set of products affected by federal mandates. However, it is clear that the main effect of this legislation is to expand the existing web of government subsidies and regulations that support ethanol while forcing consumers and taxpayers to absorb the real and exorbitant costs. We are united in our concerns about the impacts of ethanol for the environment, economy, and consumers, and urge you to oppose the Domestic Fuels Act.

Sincerely,

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[1] Roll Call Vote #134 agreeing to Sullivan of Oklahoma amendment #94: 285-136.
[2] Government Accountability Office. Biofuels Challenges to the Transportation, Scale, and Use of Intermediate Ethanol Blends. GAO-11-513. July 2011.
[3] David Hilbert, A Study of the Effects of Running Gasoline with 15% Ethanol Concentration in Current Production Outboard Four-Stroke Engines and Conventional Two-Stroke, National Renewable Energy Lab (June16, 2010 – June 30, 2011).
[4] Wise, Timothy A. and Sophia Murphy, Resolving the Food Crisis: Assessing Global Policy Reforms Since 2007, Tufts University and IATP. 2012

ActionAid USA
American Bakers
American Meat Institute
Americans for Limited Government
Americans for Prosperity
California Dairy Campaign
Clean Air Task Force
Competitive Enterprise Institute
Freedom Action
Friends of the Earth
Grocery Manufactures Association
Milk Producers Council
National Black Chamber of Commerce
National Chicken Council
National Council of Chain Restaurants
National Meat Association
National Taxpayers Union
National Turkey Federation
Oxfam America
Southeast Milk Inc
Taxpayers for Common Sense

April 18, 2012

The Honorable John Shimkus
Chairman
House Subcommittee on
Environment and the Economy
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Gene Green
Ranking Member
House Subcommittee on
Environment and the Economy
H2-564 Ford House Office Building
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Green:

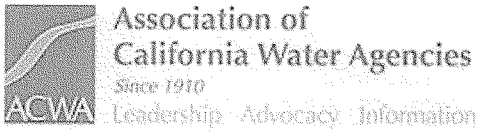
The undersigned organizations oppose H.R. 4345, the Domestic Fuels Protection Act of 2012, which provides broad liability exemptions to fuel producers, engine manufacturers and retailers of virtually all transportation fuels and fuel additives such as methyl tertiary-butyl ether (MTBE) and 15 percent ethanol (E15) blend. The bill grossly undermines state consumer protection laws, gives immunity to makers of defective fuel products, and shields owners and operators of leaking underground storage tanks from legal action. Furthermore, it passes associated risks onto consumers, who are left exposed to billions of dollars in potential damages with no means of recourse.

These exemptions will likely endanger public health and consumer safety. Twenty-five states have banned MTBE, a gasoline additive notorious for leaking from underground storage tanks, yet its handlers would qualify for liability protection. Ethanol producers and distributors would also be exempt from liability for E15, a fuel which has been found to cause engine failure in boats, non-road vehicles and equipment, void auto warranties and contribute to lower gas mileage.

As the Subcommittee prepares for its legislative hearing on April 19th we ask that you consider these concerns.

Sincerely,

Alliance for Justice
Center for Auto Safety
Center for Justice & Democracy
National Consumers League
Public Citizen
U.S. PIRG



April 19, 2012

The Honorable Henry Waxman
Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mary Bono Mack
Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Doris Matsui
Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lois Capps
Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

Dear Members of the California Delegation:

The Association of California Water Agencies (ACWA) and California Association of Sanitation Agencies (CASA) are writing to express our concerns with HR 4345, the Domestic Fuels Act. ACWA's 450 public water agency members supply over 90 percent of the water delivered in California for residential, agricultural, and industrial uses. CASA is a statewide organization representing over 90% of California's sewer population. Together our members provide water and wastewater service throughout California.

We understand that the goal of HR 4345 is to streamline the rules and regulations governing the operation of underground storage tanks. However, several provisions in the legislation place the quality of California's drinking water in jeopardy. Specifically, we object to:

- Section 2(b) Compatibility with Fuels. Language within this section effectively preempts states ability to regulate underground storage tanks and equipment. It also deems all existing storage tanks and equipment compatible with all fuel additives as long as "a national recognized laboratory" lists it as compatible. The nationally recognized laboratory listing overrides state authority and applies even if future tests show the tanks and equipment are incompatible.

- Section 4(a) dismissing with prejudice all on-going civil lawsuits in state and federal court over fuels and all types of fuel additives including MTBE. Our member agencies are fighting to obtain help from responsible parties to cleanup groundwater contamination. The language in this section would negate approximately 10 on going court cases in California with over $100 million

in damages. If these court cases are dismissed, ratepayers would have to pay for these cleanup projects.

- Section 4(b) providing immunity from liability (safe harbor) to producers of all current and future gasoline additives. ACWA and CASA have long objected to this provision because it transfers the cost of cleaning up contaminated groundwater from the responsible parties to the ratepayers.

ACWA and CASA strongly encourage you to revise the bill so as not to place the safety of our nation's drinking water at risk. If you have any questions, please contact Abby Schneider in ACWA's Washington DC office at (202) 434-4760 or CASA's Washington Representative Eric Sapirstein at (202) 466-3766.

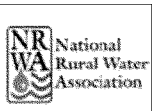
Sincerely,

Catherine Smith

Catherine Smith, CAE
Executive Director
California Association of Sanitation Agencies

Timothy Quinn
Executive Director
Association of California Water Agencies

cc: Chairman John Shimkus
Ranking Member Gene Green
California Congressional Delegation



April 18, 2012

The Honorable John Shimkus
Chairman, Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Gene Green
Ranking Member, Subcommittee on Environment and the Economy
U.S. House of Representatives
Washington, D.C. 20515

RE: MTBE Liability Waiver in the "Domestic Fuels Protection Act"

Dear Chairman Shimkus and Ranking Member Green,

As the Environment and the Economy Subcommittee convenes a hearing on H.R. 4345, the "Domestic Fuels Protection Act," the drinking water community would like to register our concern about Section 4 of the bill, which would allow polluters to pass on to communities and their customers the cost of cleaning up drinking water sources contaminated by MTBE (methel tertiary-butyl ether). This issue of "safe harbor" for contamination by MTBE came up during the 109th Congress, and the House and Senate ultimately did not include such provisions in the comprehensive energy bill enacted in 2005. We hope that Congress will reach the same conclusion on a potential MTBE liability waiver this year as well.

To recap some the issues discussed in 2005:

- MTBE travels faster through the ground than other constituents of gasoline and does not biodegrade easily;
- Humans can taste the presence of MTBE in water containing as little as 2 parts per billion;
- There is no requirement that MTBE be used as an oxygenate for gasoline; and
- Studies have concluded that MTBE is an animal carcinogen with the potential to cause cancer in humans.

Many communities are already straining under the cost of billions of dollars in water infrastructure repair and replacement needs, and past studies have estimated that it could cost more than $30 billion to remove MTBE from contaminated water sources across the country. Local water utility ratepayers simply cannot afford to foot the entire bill to remove MTBE pollution from their drinking water sources, nor should they.

As introduced in the House of Representatives, Section 4 of H.R. 4345 would provide product defect liability immunity ("safe harbor") to producers of a wide range of gas additives, including MTBE. If enacted, ongoing lawsuits by drinking water systems

against MTBE producers would be dismissed, and those producers would have little incentive to prevent, much less clean up, MTBE contamination resulting from their activities. Affected water systems would not only have to finance billions in cleanup costs, but also find and pay for new sources of drinkable water – all without assistance from the party responsible for the pollution in the first place. In many cases, the result would be increased water rates to offset these costs, or deferred rehabilitation and replacement of aging water infrastructure.

With these concerns in mind, we encourage you to amend H.R. 4345 to ensure that no local community or drinking water system will be left without the ability to recover costs associated with remediating MTBE or other similar contamination of drinking water sources.

Our association members, in partnership with the U.S. Environmental Protection Agency and Congress, have a unique responsibility in ensuring that Americans receive the safest drinking water possible. Granting safe harbor to MTBE or other, similar contamination would be incompatible with that duty. Thank you for considering our perspectives, and we look forward to working with you on this critically important issue.

Sincerely,

American Water Works Association
Association of California Water Agencies
Association of Metropolitan Water Agencies
National Rural Water Association

cc: Environment and the Economy Subcommittee members

Environmental Working Group • Friends of the Earth • Greenpeace
Natural Resources Defense Council • Our Children's Earth Foundation

April 18, 2012

The Honorable John Shimkus
Chairman
House Subcommittee on
Environment and the Economy
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Gene Green
Ranking Member
House Subcommittee on
Environment and the Economy
H2-564 Ford House Office Building
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Green:

We, the undersigned organizations, strongly oppose H.R. 4345, the Domestic Fuels Protection Act of 2012, which would grant liability exemptions for makers and retailers of transportation fuels and fuel additives such as methyl tertiary-butyl ether (MTBE) and 15 percent ethanol (E15) blend that have been found to endanger public health and the environment. Twenty-five states have banned the gasoline additive MTBE, a groundwater contaminant leaked from storage tanks, yet the bill would exempt owners and operators of leaking underground storage tanks from civil suits. Meanwhile, communities would be left paying billions in cleanup costs and other damages.

Additionally, ethanol producers and distributors would also be exempt from liability for E15, a fuel whose production is linked to water and air pollution, agricultural runoff, and soil erosion, and whose use will likely harm engines, void warranties and cause safety problems. Using E15 in older cars or other vehicles not compatible with the new fuel also risks increasing dangerous tailpipe emissions. The Environmental Protection Agency's labeling requirements for fuel pumps dispensing E15 are insufficient to prevent driver misfueling and shifts liability squarely onto consumers.

Providing broad immunity from E15-related lawsuits puts all the environmental risks and hazards of this product on the American people, not the industry. We urge the Subcommittee to oppose this bill.

Thank you for your consideration.

Sincerely,

Jason Rano
Director of Government Affairs
Environmental Working Group

Kyle Ash
Senior Legislative Representative
Greenpeace USA

Michelle Chan
Economic Policy Project Director
Friends of the Earth

Nathanael Greene
Director of Renewable Energy Policy
Natural Resources Defense Council

Tiffany Schauer
Executive Director
Our Children's Earth Foundation

Clean Water Action * Earthjustice * Environment America * Environmental Working Group * Friends of the Earth * Greenpeace * National Audubon Society * Natural Resources Defense Council * Sierra Club * Southern Environmental Law Center

April 18, 2012

RE: OPPOSE H.R. 4345, THE POLLUTERS' "DOMESTIC FUELS PROTECTION ACT OF 2012"

Dear Member of the House Energy and Commerce Committee:

On behalf of our millions of members and supporters, we write to urge you oppose H.R. 4345, the "Domestic Fuels Protection Act of 2012." This bill – and especially its unprecedented waiver of liability for groundwater pollution – threatens public health by increasing the risk of further contaminating our nation's drinking water supplies with toxic chemicals. It would foist the costs of cleaning up contaminated drinking water and groundwater pollution onto the households and communities that suffer from this pollution – all to benefit the industries responsible for such spills.

The threat of financial liability for polluting our drinking water resources serves as a powerful motivation for companies to behave responsibly. If oil companies cannot be held accountable for the pollution they cause, they will have less incentive to take measures to reduce their environmental releases and more water supplies will be contaminated as a result.
By granting oil companies and gas stations immunity for pollution caused by leaking underground storage tanks and spills, this legislation would allow them to escape responsibility for polluting water supplies and unfairly put the burden of cleanup on taxpayers and household water bills.

One specific example illustrates why this legislation might be appropriately re-titled the "ExxonMobil Protection Act." In 2009, ExxonMobil was ordered to pay nearly $105 million in clean-up costs after a jury found the company liable for poisoning New York City water wells with the gasoline additive MTBE. This case will simply be dismissed, and the judgment will evaporate, if this bill becomes law, because the case is still on appeal. ExxonMobil will be off the hook and the clean-up costs will fall on New York City's households and taxpayers.

In 1996, the city of Santa Monica learned that two of its drinking water wells were heavily contaminated with MTBE. In response, 50 percent of the city's drinking water supply was shut down and the city was forced to buy replacement water. If H.R. 4345 had been law at that time, oil companies such as Shell, ChevronTexaco and Exxon that were found responsible for that contamination would have been shielded from liability.

A growing list of studies has detected MTBE in drinking water supplies throughout the nation. Because MTBE dissolves easily in water, it migrates faster and farther in the ground than other gasoline components, thus making it more likely to contaminate public water systems and private drinking water wells. MTBE does not breakdown easily and therefore is difficult and

costly to remove from ground water. In fact, every state in the country has experienced fuel leaks and water contamination, including groundwater and drinking water pollution from MTBE. This has led more than twenty States to ban the use of MTBE.

MTBE is only one of the contaminants in fuels that pose health threats to people exposed to fuel-contaminated water. The liability waiver in this bill goes far beyond provisions in legislation that Congress rejected several years ago; it would cover all types of fuel and fuel additives, containing literally thousands of toxic chemicals, like benzene, a known carcinogen. This bill is so reckless that it applies to new additives and contaminants that may be added to fuel in the future, without any regard for the health risks they may pose. It is so radically unfair and irresponsible that it would even dismiss existing liability suits for contamination that has already been caused, even if the perpetrators are known. The immunity in this bill would shield oil companies and others from liability for all design defect claims, including design defects even when the defect is known or where the risks posed by a fuel product outweigh its benefits.

In the interest of public health and fairness to consumers and taxpayers, and in the interest of corporate responsibility and accountability, we ask that you strongly oppose H.R. 4345.

Thank you for standing up for public health and fairness to communities.

Sincerely,

Joan Mulhern
Senior Legislative Counsel
Earthjustice

Brian Siu
Policy Analyst
Natural Resources Defense Council

Jason Rano
Director of Government Affairs
Environmental Working Group

Michelle Chan
Economic Policy Team Director
Friends of the Earth

Navis Bermudez
Deputy Legislative Director
Southern Environmental Law Center

Debbie Sease
National Campaigns Director
Sierra Club

Rick Hind
Legislative Director
Greenpeace

Lynn Thorp
National Campaigns Director
Clean Water Action

Shelley Vinyard
Clean Water Advocate
Environment America

Brian Moore
Legislative Director
National Audubon Society

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

MICHAEL A. CARDOZO
Corporation Counsel

(212) 788-0800
Fax: (212) 227-5641
mcardozo@law.nyc.gov

April 18, 2012

The Honorable John Shimkus
Chairman
House Energy & Commerce Subcommittee on
Environment and the Economy
2125 Rayburn HOB
Washington, D.C. 20515

The Honorable Gene Green
Ranking Member
House Energy & Commerce Subcommittee on
Environment and the Economy
2322-A Rayburn HOB
Washington, D.C. 20515

Re: Comments of the City of New York in Opposition to "H.R. 4345, the Domestic Fuels Protection Act of 2012"

Dear Chairman Shimkus and Ranking Member Green:

The City of New York ("City") submits the following comments in opposition to "H.R. 4345, the Domestic Fuels Protection Act of 2012" (hereinafter referred to as the "Domestic Fuels Act"). The City opposes the Domestic Fuels Act because it presents a clear threat to the well-established, much needed legal framework concerning the safe storage and use of motor vehicle fuels and fuel additives throughout the United States.

Most disturbingly, the Domestic Fuels Act seeks to establish a blanket liability exemption for an almost limitless set of activities related to the use and storage of motor vehicle fuels and fuel additives. Such a blanket liability exemption would substantially interfere with existing federal, state and local enforcement authorities, which serve as a critical first line of defense against the widespread problem of petroleum-related contamination in soil and groundwater. Additionally, such a provision would prohibit legitimate civil actions addressing whether fuel additives are, in fact, safe products – an issue on which the petroleum industry has a questionable record.

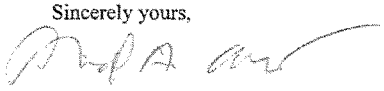
Each day, the New York City Department of Environmental Protection provides approximately one billion gallons of drinking water to nine million residents of New York State. The City's drinking water is supplied from a network of nineteen reservoirs and three controlled lakes in a nearly 2,000 square-mile watershed, roughly the size of the State of Delaware. In addition to its surface water system, the City also owns 68 groundwater wells in southeast Queens. Taking measures to ensure that that its drinking water resources are not adversely impacted by contamination from products such as petroleum and petroleum additives is a critical responsibility of a public water provider.

In 2003, the City commenced a lawsuit against approximately forty oil companies, including ExxonMobil, for the costs of removing MTBE contamination from the drinking water wells in southeast Queens. All of those companies except ExxonMobil settled. In 2009, the City went to trial against ExxonMobil in federal district court in the Southern District of New York. The City presented overwhelming evidence, using ExxonMobil's own documents, that ExxonMobil added MTBE to gasoline knowing that it would contaminate groundwater when the gasoline leaked and knowing that underground storage tanks at gas stations, many of which are owned by Exxon Mobil, regularly leak. The City also established that ExxonMobil ignored warnings from its own scientists and engineers not to use MTBE in areas of the country, like Queens, that have shallow aquifers and use groundwater as a source of drinking water and failed to inform anyone of the dangers from MTBE. A federal jury found ExxonMobil liable, among other bases on product liability grounds, for contaminating New York City's groundwater, and awarded the City $105 million in damages, only a fraction of the costs faced by the City to clean up the MTBE in its drinking water resulting from ExxonMobil's activities. ExxonMobil has appealed the jury's verdict.

Congress should not provide blanket protection for companies such as Exxon and interfere with the determination of a federal jury either in this lawsuit or in similar lawsuits that the City or others may bring in the future to recover for the harm to public assets caused by tortuous conduct. Simply put, the public should not bear the cost of bad decisions voluntarily made by private companies, particularly when those companies are among the largest in the world. Thus, the City strongly opposes passage of the Domestic Fuel Act, and has attached specific comments on two of its most problematic and striking provisions.

The City respectfully requests that its comments in opposition to the Domestic Fuels Act be entered into the record and that the House of Representatives reject the Domestic Fuels Act.

Sincerely yours,



Michael A. Cardozo

cc: The Honorable Fred Upton, Chairman, House Energy & Commerce Committee
The Honorable Henry A. Waxman, Ranking Member, House Energy & Commerce Committee
House Energy & Commerce Subcommittee on the Environment and the Economy

New York City Comments H.R. 4345: Domestic Fuels Protection Act of 2012

Concerns Regarding Section 2 of the Domestic Fuels Act

Section 2 of the Domestic Fuels Act provides that, so long as a storage tank or dispensing equipment meets new EPA regulations or guidelines, no entity can be held liable under any federal, state, or local law for having an underground storage tank or dispensing equipment that was incompatible with that fuel or fuel additive. This provision would significantly interfere with existing federal, state, and local petroleum spill response programs, as well as actions by private or public entities seeking injunctive relief or cost recovery arising from petroleum spills.

This proposed legislation would pose a significant obstacle to prompt enforcement action and cost recovery. If a petroleum spill occurs from an underground storage tank that the owner certifies as "compatible" either under EPA regulations or by a nationally recognized testing laboratory, state or local authorities ability to obtain relief to promptly abate and remediate such a condition will be severely limited. Indeed, the owner of the tank would be able to continue adding fuel into the leaking tank without any incentive or legal obligation to stop this harmful activity. Moreover, the tank owner would be immune from paying for the cost of remediation, thereby placing the sole financial burden on the state, local authorities, or injured private individuals.

Concerns Regarding Section 4 of the Domestic Fuels Act

The provisions contained Section 4 also do not constitute legitimate public policy to promote the use of renewable fuels. The provisions, instead, amount to nothing more than a license to pollute and market unsafe products.

First, Section 4(a) states that no "qualified civil liability action" can be maintained in any court. Any "qualified civil liability" action pending on the day of enactment of the bill would be dismissed with prejudice. A "qualified civil liability action" is defined as any claim brought against a "qualified entity" when the cause of action rests upon damage caused by the introduction of a "qualified product" into any motor vehicle, motor vehicle engine, non-road vehicle, non-road engine or non-road equipment.

These definitions are so broad in scope that this section effectively immunizes any entity in the petroleum chain of commerce of any fuel or fuel additive product that is commercially available, regardless of its culpability in causing such harm. Moreover, this provision is intended to be retroactive and would result in the immediate dismissal of countless lawsuits pending throughout the country, regardless of their merit. Given the scope of this clause, this would include not only private tort claims, but actions brought by or on behalf of governments to seek just compensation from the entities wrongfully protected by this provision.

Second, Section 4(b) creates an undeserved safe harbor for so called "qualified products". Section 4(b) states that, so long as the product does not violate an EPA prohibition or control under the federal Clean Air Act, the product cannot be considered to be defective under federal, state, or local law. While this law creates a safe harbor for petroleum companies, it creates a

perfect storm for entities or individuals harmed by these products. There is no basis for this extreme and unprecedented liability protection.

Statement for the Record
Underwriters Laboratories Inc.
Hearing on the Domestic Fuels Protection Act of 2012 (HR 4345)
Subcommittee on Environment and the Economy
House Energy and Commerce Committee
April 19, 2012

Who is UL?

UL (Underwriters Laboratories Inc.) is an independent standards developer and product testing and certification organization dedicated to public safety. Since our founding in 1894, UL's engineers and staff have helped develop safety standards and product-testing protocols, conducted independent product safety testing and certification, and inspected manufacturing facilities around the world. UL is driven by our global safety mission, which promotes safe living and working environments by the application of safety science and hazard-based safety engineering. The application of these principles manifests itself in the evaluation of tens of thousands of products, components, materials, and systems for compliance to specific requirements. Through these activities, UL actively engages the US government in its development and administration of federal regulations and conformity assessment programs at the federal, state, and local levels. UL works with all participants as a neutral party to ensure the safest possible outcome for those who work with and rely on the products at issue.

What does UL Certification Mean?

As the primary Nationally Recognized Testing Laboratory (NRTL) for equipment in this industry, UL certifies underground storage tanks, underground storage tank systems, and associated dispensing equipment The Domestic Fuels Protection Act of 2012 (H.R. 4345) seeks to provide liability protection for owners or operators utilizing legacy equipment for "compatible fuels" or "fuel additives" as long as these fuels are deemed compatible by the Environmental Protection Agency (EPA) and the equipment is certified by a NRTL.

The UL Mark on or in connection with products shows that a product has been investigated by UL and found to be in compliance with the applicable requirements. The UL Mark applies to the product as it is originally manufactured when shipped from the factory. Authorized use of the UL Mark is the manufacturer's declaration that the product was originally manufactured in accordance with the applicable requirements. Unless field modifications have been specifically investigated by UL, UL does not know what the effect of a modification may have on the safety of the product or the continued validity of the UL certification mark. If the equipment has not been tested to relevant standards for various ethanol blends or fuel additives, UL cannot indicate that legacy equipment continues to meet UL safety requirements.

Underwriters Laboratories Inc.
1850 M St. N.W., Suite 1000, Washington, DC 20036-5833 USA
T: 202.296.1435 / F: 202.872.1576 / W: UL.com

UL Certification for Fuel Dispensing Equipment

UL currently offers three certification options for dispensing equipment, covering a comprehensive range of ethanol blend levels.

1. UL 87 for dispensers to be used with unblended gasoline or E10.
2. UL Subject 87A-E25 for unblended gasoline and any ethanol blend up to E25.
3. UL Subject 87-E85, for unblended gasoline and any ethanol blend up to E85.

DOE & NREL Study

UL's standards and product listings are based on sound safety research and science. Research has shown that there may be some issues with certain legacy equipment certified to UL 87 when exposed to higher ethanol fuel blends. Of particular concern is the degradation of gaskets, seals, and hoses which can occur when these elastomers are exposed to greater than E10 ethanol blends. Breakdown of these components can cause leaks. One example of this research is a report commissioned by the US Department of Energy (DOE) and the National Renewable Energy Laboratory (NREL) and released in September 2010. The research is attached for inclusion in our statement. In situations where E15 is to be dispensed, UL recommends the use of new, listed equipment designed and identified for use with mid-level blends. There are currently dispensing units on the market listed for use with blends up to E25 under UL Standard UL 87A-E25.

If you have any questions or would like to discuss elements of this submission, please contact Khoi Do, UL's Senior Specialist for Product Safety in our Global Government Affairs department. (khoi.do@ul.com)

Enclosure: Dispensing Equipment Testing With Mid-Level Ethanol/Gasoline Test Fluid Summary Report

Dispensing Equipment Testing With Mid-Level Ethanol/Gasoline Test Fluid

Summary Report

September 2010

Kenneth Boyce, Principal Engineer Manager - Energy
J. Thomas Chapin, Vice President – Corporate Research

Underwriters Laboratories Inc.
333 Pfingsten Road
Northbrook, Illinois 60062

NREL Technical Monitor: Kristi Moriarty

Prepared under Subcontract JGC-0-99152-01

Executive Summary

The National Renewable Energy Laboratory's (NREL's) Nonpetroleum-based Fuel Task is responsible for addressing the hurdles to commercialization of fuels and fuel blends that are derived from biomass, such as ethanol. One such hurdle is the unknown compatibility of new fuels with existing infrastructure, such as the equipment used at service stations to dispense fuel into automobiles. The Department of Energy's (DOE's) Vehicle Technology Program and the Biomass Program have engaged in a joint program to evaluate the potential for blending ethanol into gasoline greater than the present allowance of nominal 10 volume percent (E10).

The United States Environmental Protection Agency (EPA) has the authority to grant waivers for new fuels and fuel blends to be legally entered into commerce. EPA is currently considering a waiver application for 15% by volume ethanol blended into gasoline (E15). Should the waiver be granted, it is possible that service stations would use existing equipment to dispense the new fuel.

This project was established to better understand any potentially adverse impacts that might occur due to a lack of knowledge about the compatibility of the dispensing equipment with ethanol blends higher than what the equipment was designed to dispense. This work provides data on the impact of introducing a gasoline with a higher volumetric ethanol content into the dispensing equipment at existing service stations from a safety and performance perspective.

The project consisted of testing both new equipment and used equipment harvested from the field. Testing was performed according to requirements in Underwriters Laboratories Inc. (UL) Outline of Investigation for Power-Operated Dispensing Devices for Gasoline and Gasoline/Ethanol Blends With Nominal Ethanol Concentrations up to 85 Percent (E0-E85), Subject 87A, except using a CE17a test fluid based on the scope of this program. The primary focus of the testing was to identify leakage and assess other safety-related performance of the equipment as addressed by the applicable UL requirements for the equipment.

Various pieces of new and used dispensing equipment demonstrated compliant results in the testing program. Equipment including shear valves, flow limiters, submersible turbine pumps, and hoses generally performed well. Some equipment, both new and used, demonstrated performance during and after long-term exposure that indicated a reduced level of safety and/or performance. Meter/manifold/valve assemblies in particular demonstrated largely noncompliant results. Responses of nonmetals, primarily gaskets and seals, were involved with these noncompliances.

Acronyms and Abbreviations

ASTM	ASTM International
CE17a	Test fluid comprised of predetermined amounts of aggressive ethanol and ASTM Reference Fuel C
EPA	United States Environmental Protection Agency
DOE	United States Department of Energy
NREL	National Renewable Energy Laboratory
SAE	Society of Automotive Engineers
UL	Underwriters Laboratories Inc.

I. INTRODUCTION

Background

The National Renewable Energy Laboratory's Nonpetroleum-based Fuel Task is responsible for addressing the hurdles to commercialization of fuels and fuel blends that are derived from biomass, such as ethanol. One such hurdle is the unknown compatibility of new fuels with existing infrastructure such as the equipment used at service stations to dispense fuel into automobiles.

The United States Environmental Protection Agency (EPA) has the authority to grant waivers for new fuels and fuel blends to be legally entered into commerce. EPA is currently considering a waiver application for 15% by volume ethanol blended into gasoline (E15). Should the waiver be granted, it is possible that service stations would use existing equipment to dispense the new fuel.

According to the US Energy Information Administration, as of 2008 there were almost 162,000 retail gasoline outlets in the United States[1]. The equipment presently installed and in use at these stations consists of products from various existing and defunct manufacturers, of varying ages, maintained to varying degrees using different processes. The potential responses of the legacy base of installed fuel dispensing equipment to different fuel compositions such as E15 are unknown.

Purpose

This project used a systematic method to evaluate the performance of fuel dispensing equipment when exposed to a defined test fluid. The tests in this program provide a methodology for assessing the equipment response to the predetermined test conditions, with a focus on loss of containment (leakage) and other safety-related performance.

In the equipment design process, materials are selected based on particular design considerations and performance requirements for the system. A key aspect of the selection is the compatibility of the materials (metals, plastics and elastomers) with the fuel to which it will be exposed. Thus, an effective selection process is based on a comprehensive understanding of the material's mechanical, physical and chemical properties. These materials are selected and used to produce component parts of equipment. The intended use of the equipment is a critical parameter in defining the required performance with regard to specific attributes.

In the case of fuel dispensing equipment, materials that were selected based on a characteristic compatibility with gasoline and gasoline/ethanol blends up to E10 may not exhibit the same compatibility with different fuel compositions. This program systematically evaluated the response of fuel dispensing equipment to exposure to ethanol/gasoline fuels with greater ethanol content by performing

testing in the form of accelerated long-term exposure and subsequent assessment or safety performance.

Tests were conducted on both new (previously unused) samples of equipment listed for gasoline and E10 use, and on used equipment that dispensed gasoline or E10 in the field. For harvested equipment, this testing was conducted to reflect a "second life" of the equipment in dispensing a new fuel.

II. TEST ITEMS AND METHODS

Test Items

Identification and procurement of the equipment to be tested was performed by NREL. Samples were subsequently delivered and prepared for test at the UL laboratory facility. A labeled photo of fueling equipment is available in Appendix B.

Selection – NREL identified test items based on discussions with a variety of stakeholders with knowledge of the practical use of fuel dispensing equipment. Stakeholders provided information about the prevalence of particular equipment in the marketplace. They also provided information about installation and maintenance conditions and experience. After gathering and evaluating input from stakeholders, specific pieces of equipment were targeted as preferred test items for the testing program.

Equpiment samples of identified test items were obtained for testing from various sources. Used equipment was obtained from the marketplace based on availability. The used dispensers were in use in different geographic locations for varying durations and may have been subjected to variable levels of maintenance.

The test items selected for the program were listed for use with gasoline and E10. The legacy standards used to evaluate these products in some cases specify the use of ASTM Reference Fuel H test fluid (85% ASTM Reference Fuel C and 15% nonaggressive ethanol).

Preparation – All samples were provided with closures to effectively seal all openings in the device under test. Dispenser samples were modified to reduce the height in order to be placed in the test chamber and to maximize use of test chamber space to generate data. Size reduction methods were selected to preserve the integrity of the manufacturer's assembled connections, joints, seals and structure to the maximum extent possible.

Dispenser samples were configured for the Long-term Exposure test with hanging hardware to simulate practical use and promote test efficiency. The hanging hardware consists of the breakaway coupling, flexible hose, swivel, and hose nozzle valve. Following the Long-term Exposure test, these samples were

disassembled in order to perform applicable performance testing on the required equipment.

Test Methods

Test methods were based on established, recognized protocols that were modified to address the specific focus of this program.

Test Fluid – The tests were conducted using CE17a test fluid, as defined by NREL. The test fluid was based on the same standard used to evaluate material compatibility for flex fuel vehicles. A 17% ethanol volumetric concentration was selected to address E15 use. The test fluid was not a fuel used in commerce, but rather a test fluid selected for research purposes.

CE17a test fluid consists of a mixture of 83% ASTM Reference Fuel C and 17% aggressive ethanol. Reference Fuel C is a 50/50 v/v blend of isooctane and toluene. Aggressive ethanol as defined in SAE Publication J1681, *Gasoline, Alcohol, and Diesel Fuel Surrogates for Materials Testing*, is a mixture of synthetic ethanol and the following aggressive elements in defined amounts: deionized water, sodium chloride, sulfuric acid, and glacial acetic acid. The test fluids were prepared the same day as they were used in order to minimize potential effects on the test fluid.

Test Methodology – Tests were conducted in accordance with the applicable methods specified in the *Outline of Investigation for Power-Operated Dispensing Devices for Gasoline and Gasoline/Ethanol Blends With Nominal Ethanol Concentrations up to 85 Percent (E0-E85)*, Subject 87A[2], except for the use of the CE17a test fluid outlined above. The testing methodology was developed with significant industry participation. These test criteria are defined to address reasonable safety of the equipment, focusing on loss of fuel containment and other safety-critical performance such as loss of ability to stop fuel flow or failure of breakaway couplings to separate at appropriate forces[3]. A brief summary of the test protocols follows; unless otherwise noted, references are to UL Subject 87A:

- Long-term Exposure: Sec. 29. Samples were filled with test fluid and placed in a 60°C ± 2°C chamber for a total period of 2,520 hours. On a weekly basis a 50 psi leakage test was conducted and the test fluid was replaced with fresh test fluid. Extracted test fluids were retained for subsequent analytical testing from one new and one used dispenser of similar design. Following Long-term Exposure testing, samples were subjected to applicable performance tests dependent upon the type of equipment.
- High-Pressure Leakage Test: Sec. 30. Samples were subjected to a hydrostatic or aerostatic pressure of 150% of the rated value, but not less than 75 psi.

- Meter Endurance: Sec. 31. Meter samples were operated at rated pressure for a period of 300 hours, and then were subjected to a leakage test at 150% of rated pressure, but not less than 75 psi.
- Endurance Test – Pumps: Sec. 32. Pump samples were operated at the maximum discharge pressure developed by the pump for a period of 300 hours.
- Hydrostatic Strength Test: Sec. 34. Samples were exposed to an internal hydrostatic pressure of 250 psi for a period of 1 minute.
- Leakage and Electrical Continuity test: Sec. 35. Hose samples were pressurized and the electrical resistance was measured.
- Hose Bending Test (Filled): Sec. 36. Hose samples were filled with test fluid and subjected to a defined bending process for 3,150 cycles per day for 6 days.
- Low Temperature Test: Sec. 37. Hose samples were filled with test fluid for conditioning for a specific duration, and then drained and capped. Following the conditioning, the samples were placed in a chamber at –40°C ± 2°C for a period of 16 hours, and subsequently bent around a mandrel with defined properties.
- Seat Leakage Test - Breakaway Couplings: Sec. 38. Breakaway coupling samples were uncoupled and subjected to a hydrostatic or aerostatic pressure of 150% of the rated value for a period of 1 minute. The test was then repeated with a pressure of 0.25 psi.
- Operation Test – Electrically Operated Valves: Sec. 39. Electrically operated valve samples were connected to a test fluid system under rated pressure with the valve in the open position and fluid flowing, then the valve was closed to determine if there was continued fluid flow.
- Electrical Continuity Test: Sec. 42. The electrical resistance across the element was measured.
- Pull Test – Breakaway Couplings: Sec. 43. Breakaway coupling samples were subjected to a pull force to verify that they would separate at a force value not more than the rated value and not less than 100 pounds.
- Endurance Test – Breakaway Couplings: Sec. 44. Re-connectable breakaway coupling samples were subjected to 100 cycles of separation and re-connection.
- Operation Test – Swivel Connectors: Sec. 45. Swivel connector samples were subjected to 100,000 cycles of operation under defined conditions.
- Endurance Test – Hose Nozzle Valve: Sec. 46. Hose nozzle valve samples were subjected to 100,000 cycles of operation.
- Pull Test – Hose Assemblies: Sec. 49. Hose assembly samples with end couplings were subjected to a 400-pound pull force.
- Shear Section: Sec. 61. Shear valve samples were subjected to a bending moment of not more than 650 pound-feet to verify the valve would close.
- Ozone Test: Sec. 62. Specimens from hose samples were exposed to ozone for 70 hours and examined for cracking.

- Dielectric Strength: UL 79, Sec. 61. Pump samples were subjected to a 60 Hz potential of 1,460 V applied between live electrical parts and dead metal for a period of 1 minute.

Equipment testing is typically terminated when a noncompliance is noted. However, in the interest of gathering the most possible data, testing after a noncompliance was continued to the degree possible in this program. In some cases, test results are interdependent and the root cause of noncompliances in one test may lead to noncompliances in other tests.

III. RESULTS

Table 1 contains a summary of the test results observed on the new dispenser samples and dispensing equipment subassemblies. Dispenser samples were configured with hanging hardware for the Long-term Exposure Test.

Table 1: Tests on New Samples

Sample	Tests Conducted	Results
Dispenser #1	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant
Meter/manifold/electric valve assembly #1	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant
	Meter Endurance	Noncompliant. Leakage noted during endurance test from meter and valve seals. As a result, no further testing could be conducted.
Dispenser #2	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant
Meter/manifold/electric valve assembly #2	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Meter Endurance	Noncompliant. Leakage noted during endurance test from valve seals. As a result, no further testing could be conducted.
Breakaway #1 (reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Seat Leakage	Compliant
	Pull	Compliant
	Endurance	Noncompliant. Poppet disengaged and leakage noted.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Breakaway #2 (reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Pull Test	Compliant
	Seat Leakage	Compliant
	Endurance	Compliant
	High-pressure leakage (repeated)	Compliant
	Seat Leakage	Noncompliant. Leakage noted.
	Pull (repeated)	Compliant
	Hydrostatic Strength	Inconclusive. Sample separated at 180 psi and could not reach 250 psi test pressure
	Electrical Continuity	Compliant

Breakaway #3 (reconnectable)	Long-term Exposure	Compliant
	High Pressure Leakage	Compliant
	Seat Leakage	Compliant
	Pull	Compliant
	Endurance	Noncompliant. Poppet o-ring displaced and leakage noted.
	High-pressure leakage (repeated)	Compliant
	Seat Leakage (repeated)	Noncompliant. Leakage noted.
	Hydrostatic Strength	Inconclusive. Sample separated at 178 psig and could not reach test pressure
	Electrical Continuity	Compliant
Breakaway #4 (non-reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Pull	Compliant
	Seat Leakage	Compliant
	Electrical Continuity	Compliant
Breakaway #5 (non-reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Pull	Compliant
	Seat Leakage	Compliant
	Electrical Continuity	Compliant
Flow Limiter #1	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Hose Assembly #1	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant
Hose Assembly #2	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
	Hydrostatic Strength	Compliant

Hose assembly #3, with integral swivel	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Swivel Operation	Compliant
	High-pressure leakage (repeated)	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant
Hose assembly #4	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
Hose assembly #5	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
Hose assembly #6	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant
Hose assembly #7	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant
Hose assembly #8	Long-term Exposure	Noncompliant. Ferrule started leaking during pressure testing in week 8 of long-term exposure.
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant
Hose #9	Hose Bending Test (Filled)	Compliant
	Leakage and Electrical Continuity	Compliant
	Low Temperature	Compliant

Nozzle #1	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Inconclusive; nozzle shut off flow after approx. 14,000 cycles of endurance and would not allow further flow. As observed the test terminated in a safe condition.
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Nozzle #2	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Nozzle #3	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Inconclusive; nozzle shut off flow after approx. 83,000 cycles of endurance and would not allow further flow. As observed the test terminated in a safe condition.
	High-pressure leakage (repeated)	Noncompliant. Leakage noted.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Nozzle #4	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Compliant
	High-pressure leakage (repeated)	Noncompliant. Leakage noted.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Nozzle #5	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant

Nozzle #6	Long-term Exposure	Compliant
	High-pressure leakage	Noncompliant. Leakage noted.
	Endurance	Compliant
	High-pressure leakage (repeated)	Noncompliant. Leakage noted.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Shear Valve #1	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Hydrostatic Strength	Compliant
	Shear Section	Compliant
Shear Valve #2	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Hydrostatic Strength	Compliant
	Shear Section	Compliant
Shear Valve #3	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Hydrostatic Strength	Compliant
	Shear Section	Compliant
Submersible turbine pump #1	Long Term Exposure	Compliant
	Hydrostatic Strength	Inconclusive. Required test pressure could not be applied based on sample configuration.
	Dielectric Strength	Compliant
Swivel #1	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Operation	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Swivel #2	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Electrical Continuity	Compliant
	Operation	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant

Swivel #3	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Operation	Noncompliant. Leakage noted after approx. 26,000 cycles on swivel nut.
	High-pressure leakage (repeated)	Noncompliant – leakage noted at swivel nut.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant

Table 2 contains a summary of the test results observed on used dispensers and dispensing equipment subassemblies.

Table 2: Tests on Used Samples

Sample	Tests Conducted	Results
Dispenser #3	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant
Meter/manifold/electric valve assembly #3	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Meter Endurance	Compliant
	High-pressure leakage repeated	Compliant
	Hydrostatic Strength	Compliant
	Operation Test – Electrically Operated Valves	Noncompliant. Valve did not shut off flow.
Nozzle #7	Long-term Exposure	Noncompliant. Leakage noted during pressure testing starting in week 10 of long-term exposure.
	High-pressure leakage	Noncompliant. Leakage noted.
	Endurance	Noncompliant; 100,000 cycles completed but leakage noted.
	High-pressure leakage (repeated)	Noncompliant. Leakage noted.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Breakaway #6 (reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Seat leakage	Compliant
	Pull Test	Compliant
	Endurance	Noncompliant; seat leakage noted at 71 cycles
	Seat Leakage	Noncompliant. Leakage noted.
	Electrical Continuity	Compliant
Hose assembly #10	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
Hose assembly #11, with integral swivel	Long-term Exposure	Compliant
	Swivel Operation	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Compliant

Dispenser #4	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant
Meter/manifold/electric valve assembly #4	Long-term Exposure	Compliant.
	High-pressure leakage	Compliant
	Meter Endurance	Noncompliant. Leakage noted during endurance test from meter and valve seals. As a result, no further testing could be conducted.
Nozzle #8	Long-term Exposure	Noncompliant. Seat leakage noted during pressure testing in week 9 of long-term exposure.
	High-pressure leakage	Noncompliant. Leakage noted.
	Endurance	Noncompliant; 100,000 cycles completed but seat leakage noted
	High-pressure leakage (repeated)	Noncompliant. Leakage noted
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Breakaway #7 (reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Seat Leakage	Compliant
	Pull	Noncompliant. Separated above rated value.
	Endurance	Compliant
	High-pressure leakage (repeated)	Compliant
	Seat Leakage	Compliant
	Pull (repeated)	Compliant
	Electrical Continuity	Compliant
	Hydrostatic Strength	Inconclusive. Sample separated at 208 psig and could not reach test pressure
Hose assembly #12	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
Hose assembly #13, with integral swivel	Long-term Exposure	Compliant
	Swivel Operation	Compliant
	Leakage & Electrical Continuity	Compliant
	Hydrostatic Strength	Compliant
	Ozone	Noncompliant; cracking noted
Dispenser #5	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant

Meter/manifold/electric valve assembly #5	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Meter Endurance	Noncompliant. Leakage noted at valve seal. As a result, no further testing could be conducted.
Nozzle #9	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Breakaway #8 (reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Seat Leakage	Compliant
	Pull Test	Noncompliant. Separated above rated value. After separation, sample could not be reassembled to complete other tests.
	Electrical Continuity	Compliant
Swivel #4	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Operation Test	Noncompliant. Body joint leaked after approx. 62,000 cycles. Swivel nut leaked after approx. 12,200 cycles.
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Hose assembly #14, with integral swivel	Long-term Exposure	Noncompliant. Ferrule started leaking during pressure testing in week 7 of long-term exposure.
	High-pressure leakage	Compliant
	Swivel Operation	Compliant
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Leakage & Electrical Continuity	Compliant
	Ozone	Noncompliant – cracking noted
Dispenser #6	Long-term Exposure	Compliant
	High-pressure Leakage	Compliant

Meter/manifold/electric valve assembly #6	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Meter Endurance	Noncompliant. Leakage noted during endurance test from meter and valve seals. As a result, no further testing could be conducted.
Nozzle #10	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Endurance Test	Noncompliant. Seat leakage noted and automatic shutoff not operating after approx. 61,000 cycles of Endurance Test.
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Breakaway #9 (non-reconnectable)	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Seat Leakage	Compliant
	Electrical Continuity	Compliant
Swivel #5	Long-term Exposure	Compliant
	High-pressure leakage	Compliant
	Operation Test	Noncompliant; swivel nut leaked after approximately 3000 cycles. Testing on body joint was compliant.
	High-pressure leakage (repeated)	Compliant
	Hydrostatic Strength	Compliant
	Electrical Continuity	Compliant
Hose Assembly #15	Long-term Exposure	Compliant
	Leakage & Electrical Continuity	Compliant
	Pull	Compliant
	Hydrostatic Strength	Compliant

IV. ANALYSIS

An exhaustive literature search was conducted on the subject of gasoline and gasoline-ethanol blended fuel compatibility with fuels infrastructure materials and equipment. From this investigation, numerous published reports have demonstrated that exposure to fuels such as ethanol/gasoline blends may affect materials that come into contact with the fuel. This may affect the performance of a formed part (such as a gasket) manufactured from such materials. The formed part may be affected to the degree that it modifies the performance of the equipment with respect to a critical property. In this case, a change in the performance and/or safety of the equipment may be noted. For the purposes of this program, a change in the performance of the equipment was gauged by response to the defined test conditions.

Table 3 summarizes the performance of different types of equipment in the testing program.

Table 3: Summary of Test Results on Different Types of Equipment

Equipment	Compliant test results on new samples Note 1	Compliant test results on used samples Note 1	Overall compliant test results Note 1
Breakaways	2 of 5	1 of 4	3 of 9
Flow Limiters	1 of 1	-	1 of 1
Hoses/Hose Assemblies	8 of 9	4 of 6	12 of 15
Meter/Manifold/Valve Assemblies	0 of 2	0 of 4	0 of 6
Nozzles	3 of 6	1 of 4	4 of 10
Shear Valves	3 of 3	-	3 of 3
Submersible Turbine Pumps	1 of 1	-	1 of 1
Swivels Note 2	3 of 4	3 of 5	6 of 9

Note 1: In the context of Table 3, "compliant" results is used to include fully compliant test results and inconclusive test results that did not directly manifest a hazard such as leakage during the testing that was able to be performed as a part of this research program.
Note 2: Includes swivels integral to hose assemblies.

In various cases, leakages did not occur during the long-term exposure test. These results may indicate that exposing some equipment to fuel blends with greater ethanol content may not produce an immediate or short-term response that would result in a leakage. However, this equipment may still demonstrate reduced effective life and in time lead to a reduced level of safety as assessed in the subsequent performance testing.

Some equipment, both new and used, demonstrated performance during and after the long-term exposure test that indicated a reduced level of safety and/or

efficacy. These data indicate that some pieces of equipment in the legacy base of installed equipment may be adversely affected by exposure to fuel with greater ethanol content. During this testing program, a number of leakages and other noncompliant results were noted on both new and used equipment harvested from the field. Leakages are largely attributed to effects of exposure on the gasket and seal materials. The only exceptions were cases in which a polymeric component of a breakaway coupling was degraded and the damage resulted in a consequential leakage.

Gaskets - Exposure to gasoline/ethanol blends may cause gasket and seal materials to swell[4] or otherwise be affected. Although mild swelling may produce the short-term effect of a tighter seal, swelling is indicative of a material response to exposure that may have long-term consequences regarding seal performance. Previous studies[5] identified volume swelling as one of the most critical measurements when considering tolerances for elastomeric seal housing design; swelling of elastomers over 20% are reported to cause several problems including overfill of the seal housing groove, seal extrusion damage, extremely high stresses in the seal and in the housing, occasional fracture of metal components and progressive degradation of elastomers. Past studies[6] have also established that elastomers demonstrate increased permeability of gasoline/ethanol blends with increasing ethanol content. Permeation may in turn lead to extraction of organic compounds from exposed nonmetals. In the case of fillers and other compounds that are introduced into the gasket or seal for a specific performance attribute, such extraction may fundamentally alter the material and the corresponding performance of the formed part.

Depending upon the configuration, fuel dispensers may contain in the range of 20 to 60 or more gaskets and seals. Many equipment manufacturers use a variety of gasket materials in their ongoing production of a specific piece of equipment, with potential variations in sourcing over time and different manufacturing locations. The field population of a specific piece of equipment designed for use with gasoline and E10 may incorporate a variety of gasket materials. In the past, these materials had generally been selected based on their compatibility with gasoline and E10. The materials may demonstrate varying compatibility with higher ethanol fuel blends.

Metallic Parts - In this study, there was no noted effect on metallic parts of equipment. The lack of galvanic interaction or other significant corrosion is consistent with the relatively lower ethanol content of E15 fuel serving as the subject of this study and corresponding lower electrical conductivity, in comparison to higher ethanol fuel blends such as E85.

Used Equipment – Used equipment has already been subjected to a useful life, which reflects its unique conditions of use and maintenance. Use conditions may vary widely with respect to environmental conditions such as temperature, fuels the equipment dispensed, duration of use, conditions of practical use, andsimilar.

Maintenance conditions such as adherence to applicable schedules and field modification of the equipment also may vary widely. Based on these practical issues, the response of used equipment to the prescribed test conditions may be expected to be inherently variable. Some of the used equipment demonstrated noncompliant results in this test program. However, various pieces of used subassemblies completed the testing with fully compliant results. In all cases, if legacy dispensers were to be exposed to fuel blends with greater ethanol content, effective supervision, maintenance, and inspection regimes will be important to effectively monitor the response of the equipment to the different conditions of use and proactively minimize the occurrence of hazards.

Breakaways – The breakaway coupling samples demonstrated varying performance in the test program. Three of the nine samples tested, and two of the five new samples, yielded compliant results. All three non-reconnectable samples yielded compliant results. Two of the cases of noncompliant results were for reconnectable breakaways, in which the poppet was dislodged during endurance and caused loss of containment; selection of a more appropriate poppet material would be expected to produce better practical results. Only one of the four used samples that were tested produced compliant results. Two noncompliances were noted for the pull test force on used samples. There were two instances of seat leakage, noted on one new and one used sample; selection of more appropriate sealing methods for the seat would be expected to produce better practical results in these cases.

Flow Limiter – The flow limiter sample yielded fully compliant results.

Hoses – Hoses and hose assemblies, both new and used, fared well overall. Twelve of the fifteen samples, and eight of the nine new samples, complied with all tests that were performed. Thirteen of the fourteen samples yielded results on the hoses themselves that were compliant. Of the three samples that produced noncompliant results, two leaked at the fitting ferrule, and one used sample yielded noncompliant results in the ozone test. In the cases involving leaks at the ferrule, selection of a more appropriate sealing method for the ferrule would be expected to produce better practical results.

Meter/Manifold/Valve Assemblies – The meter/manifold/valve assemblies demonstrated noncompliant results in the six dispensers tested. In five cases, the meter cover seal leaked; in the sixth case, the electric valve lost its ability to shut off the flow of fuel. These data indicate that gasket and seal materials used in these applications may be particularly affected by exposure to fuel blends with greater ethanol content. The seal materials used in this portion of the hydraulic tree may require careful consideration if fuel blends with greater ethanol content are deployed.

Nozzles – The nozzle samples demonstrated varying performance in the test program. Four of the ten samples tested, and three of the six new samples,

yielded compliant results or results that did not involve loss of containment. Five of the six noncompliant results noted involved leakage including seat leakage; selection of more appropriate sealing methods would be expected to produce better practical results. Only one of the four used samples that were tested produced compliant results.

Shear Valves – The three new shear valve samples tested in this program demonstrated compliant results in all cases.

Swivels – The swivel samples demonstrated varying performance in the test program. Six of the nine samples tested yielded compliant results. Three of the four new samples were compliant; this may indicate that more recent designs are better suited to anticipate use with E15 fuel. Three of the five used samples produced compliant results. All three noncompliant results noted involved leakage that started during the operation test. Selection of more appropriate seal materials would be expected to produce better practical results.

Submersible Turbine Pumps – The submersible turbine pump sample tested as part of this program demonstrated compliant results for the long-term exposure and dielectric strength test. The hydrostatic strength test yielded inconclusive results because the required test pressure could not be applied based on the test sample configuration; however, no noncompliant results were noted. These data do not demonstrate an incompatibility of the test item with E15, and the long-term exposure test was successfully completed.

V. CONCLUSION

The overall results of the program were not conclusive insofar as no clear trends in the overall performance of all equipment could be established.

Various pieces of new and used dispensing equipment demonstrated compliant results in the testing program. Shear valve and flow limiter test items produced compliant results, the submersible turbine pump performed well, and hoses generally yielded compliant results.

In various cases, leakages did not occur during the long-term exposure test. These results may indicate that exposing some equipment to fuel blends with greater ethanol content may or may not produce an immediate or short-term response that would result in leakage.

Some equipment, both new and used, demonstrated performance during and after the long-term exposure test that indicated a reduced level of safety and/or performance. These pieces of equipment demonstrated limited ability to safely accommodate exposure to fuels with greater ethanol content such as E15. Responses of nonmetals to exposure, notably gaskets and seals but also polymeric parts, were involved with these noncompliances. Meter/manifold/valve

assemblies in particular demonstrated largely noncompliant results; the seal materials used in this portion of the hydraulic tree may require careful consideration if fuel blends with greater ethanol content are deployed.

Analysis of the extracted test fluids may provide additional insight into the chemical interactions of the test fluids and the materials, and the corresponding degradation mechanisms; analysis results are available in Appendix A. Due to the specific nature and goals defined for this program, a finite number of test items were employed. Testing of other items in order to establish a larger sample size may provide additional insights. Further detailed analysis of the equipment that produced compliant results may establish best practices; conversely, further detailed analysis of the equipment that produced noncompliant results may further identification of root causes of equipment design that may lead to leakages or other potential risks. This work is ongoing and will be reported separately.

References

1. US Energy Information Administration website, Independent Statistics and Analysis, http://www.eia.doe.gov/ask/gasoline_faqs.asp#retail_gasoline_stations.

2. Outline of Investigation for Power-Operated Dispensing Devices for Gasoline and Gasoline/Ethanol Blends With Nominal Ethanol Concentrations up to 85 Percent (E0-E85), Subject 87A, Sixth Edition, published by Underwriters Laboratories Inc.

3. Subject 87A was developed based on technical research and collaboration with a Technical Panel. The Technical Panel was comprised of material science, fuel, and standards experts representing organizations including US National Laboratories, the renewable fuel trade, automotive manufacturers, fuel station operators, material manufacturers, and the fire service. Following the technical development process, Subject 87A was published in 2007.

4. Roland D. Stevens, "Fuel and Permeation Resistance of Fluoroelastomers to Ethanol Blends", October 10, 2006.

5. Ayca Ertekin and Narasi Sridhar, NACE Paper 09533: "Performance of Elastomeric Materials in Gasoline - Ethanol Blends - A Review", 2009.

6. Helena Aguilar and Ron G. Kander, "Fuel Permeation Study on Various Seal Materials", SAE 2000-01-1099, March 6, 2000.

APPENDIX A

Fluid Analysis Summary for Dispensers 1 and 5

Oakridge National Laboratory
Mike Kass, Tim Theiss, Sam Lewis and John Storey

During the 15-week conditioning phase of UL Subject 87A, spent fluid samples were extracted from dispensers #1 and #5 for analysis by Oak Ridge National Laboratory (ORNL). Dispenser 1 was a new dispenser while Dispenser 5 has a similar design and was used for five years. The fuel dispensing history of Dispenser 5 is unknown. During the evaluation, the fluids within the dispensers were replaced once per week for 15 weeks. A control fuel sample and tested samples from weeks 1, 2, 3, 4, 8, 10, 12 and 15 were sent to ORNL for analysis. Photographs showing the fluid coloration with sample times are shown in Figures 1 and 2 for Dispensers 1 and 5, respectively. Both sets of fluids exhibited an amber coloration during the first week of experimentation, in contrast to the control fluid, which is clear. In general, the color becomes less pronounced and more clear as the test period progresses. The fluid in Dispenser 1 retains the amber color into week 12, while the fluid extracted from Dispenser 5 loses the amber coloration around week 8. The fuel sample for week 15 for Dispenser 1 is noteworthy in that it did not follow the observed trend and exhibited a clear coloration for week 15. Analysis revealed that this sample was chemically identical to control specimen (uncontaminated CE17a). Therefore, we believe that the week 15 sample from Dispenser 1 was a second control sample and was improperly labeled prior to shipment.

The fluids were analyzed using a gas chromatography-mass spectrometer (GC-MS). GC-MS is an established analytical technique for analysis of hydrocarbon compounds in fluid-based samples. Representative GC-MS spectra for fluids extracted from Dispenser 1 and 5 are shown in Figures 3 and 4, respectively. The spectra reveal key differences between the two samples. As shown in Figure 3, fluid extracted from Dispenser 1 (a new unit) showed clear identifiable peaks associated with phthalate and polymer compounds. In contrast, the spectra shown in Fig. 4 for the fluid pulled from the used Dispenser 5 was heavily contaminated with kerosene. The presence of high kerosene levels is a strong indicator that this dispenser unit had been used to dispense kerosene at some point in its operational lifetime. Unfortunately, because the kerosene concentration was so high, any phthalate or polymer compounds that may have been present in the fluid samples would be masked out by the kerosene. Therefore, we cannot state with any certainty whether dissolved phthalates or polymers were present in the fluid samples for Dispenser 5.

The phthalates observed in the Dispenser 1 fluid samples are commonly added to dispenser hoses, and to a lesser extent in the o-rings and gaskets to increase flexibility and durability. Because phthalates are not covalently bonded to the polymer structure, they are highly susceptible to leaching and removal by fluids that are capable of penetrating into the polymer structure. The phthalate concentration as a function of week of exposure to CE17a test fluid is shown in Fig. 3 for Dispenser 1. Except for week 12, the phthalate level decreased with exposure indicating that the phthalate concentration in the diffusion region of the elastomer was decreasing with time. It our conclusion that the week 12 data points are the result of a labeling error since we cannot conceive of a

physical or chemical explanation to account for the sudden increase in phthalate concentration from week 8 to week 12, followed by an even more dramatic drop to near zero levels for week 15.

On the other hand, the decrease in phthalate concentration with sampling time can be attributed to two compounding reasons. First, the level of available phthalates in the elastomer decreases with exposure time as the phthalates are leached away and, secondly, the diffusion distance for the fluid to permeate into the elastomer to reach and dissolve the phthalate compounds also increases, thereby reducing phthalate removal. Because the phthalates are added to polymers to impart flexibility and durability, their removal will result in a stiffer component that is susceptible to cracking when flexed. We cannot state without further investigation whether the phthalate removal was caused by a single component or interaction of the CE17a ingredients. However, results from the ORNL stir-tank materials study have shown that the volume swell (a measure of permeation) for polymers increased with the addition of the aggressive ethanol in most cases.

The sample fluid from Dispenser 1 also contained high concentrations of polymer fragments indicative of fractured molecules of elastomers and rubber seals (see Fig. 4). The longer hydrocarbon chain lengths of the elastomer molecules are too large to be detected using GC-MS; however, fractured elements of the elastomer, such as hexanoic acid (shown in Fig. 4), were detected. The ester and ether molecular groups can be cleaved from the extended hydrocarbon structure through a hydrolysis reaction involving an acid acting as catalyst. Because the hydrolysis reaction requires an acid catalyst to cleave the polymer into the resulting hexanoic acid fragments, the acetic and sulfuric acid components of the test fluid are likely responsible for polymer fragmentation and subsequent detection. The resulting fragments are themselves acids and serve to propagate the hydrolysis reaction. Polymer fractionation and dissolution would eventually lead to structural damage and a weakening of gaskets or o-rings. Prolonged exposure would result in gap formation between the gasket and sealed sections leading to fluid leakage.

ORNL concludes that polymer degradation was caused primarily by the acid constituents of the aggressive ethanol. There was some discussion as to whether the 60°C operating temperature was responsible for the noted polymer degradation, but the observed polymer hydrolysis fractionation cannot be attributed to temperature alone. Thermal-based reactions would result in increased crosslinking and not cleavage of the hydrocarbons chains. Additionally, thermal oxidation of the hydrocarbons would result in the formation of CO, CO_2, H_2O, and partially oxidized hydrocarbons (soot). However, the temperatures needed to promote thermal oxidation of the elastomers would be expected to exceed 60°C and no partially oxidized hydrocarbons of either the fuel or the polymers were detected.

Because the kerosene contamination in the Dispenser 5 fluid samples was so high, we were unable to identify any peaks associated with phthalate compounds or polymer fractions. Therefore, we had to rely on the Dispenser 1 fluid samples to assess potential interactions between the test fuel and dispenser materials (especially elastomers). The

fluid samples contained large levels of phthalates and fractionated polymers (hexanoic acid, etc.). The presence of phthalates indicates that the fluids were able to penetrate into the elastomer structure and remove the phthalate compounds which were added to improve flexibility. As a result the elastomers can be expected to have reduced durability. The presence of hexanoic acid is a strong indication that the weak acids present in the test fuels were able to hydrolyze and break down the molecular structure of the gasket and seal materials. Either of these two effects will degrade the physical properties of the elastomers used in the gaskets, o-rings, seals, etc. and would eventually lead to leakage.

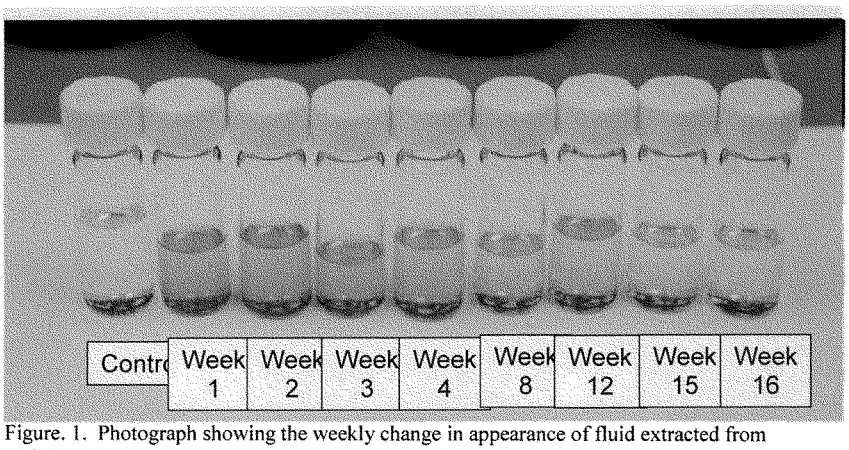


Figure. 1. Photograph showing the weekly change in appearance of fluid extracted from Unit 1.

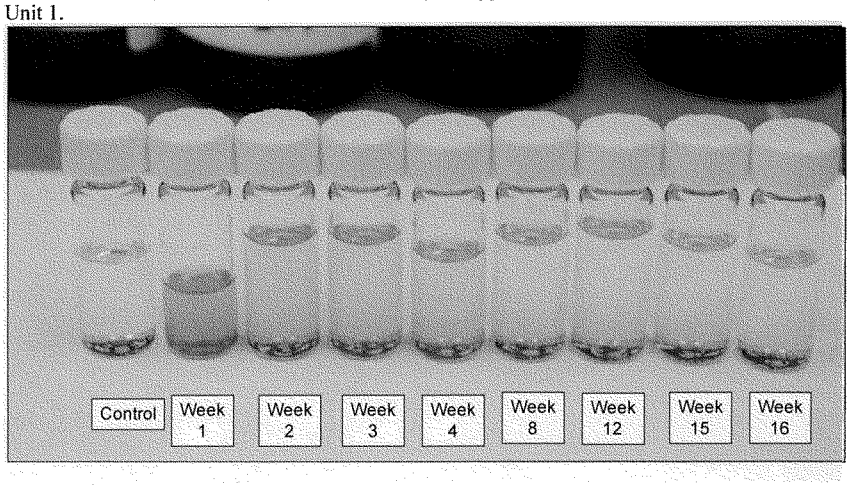


Figure 2. Photograph showing the weekly change in appearance of fluid extracted from Unit 5.

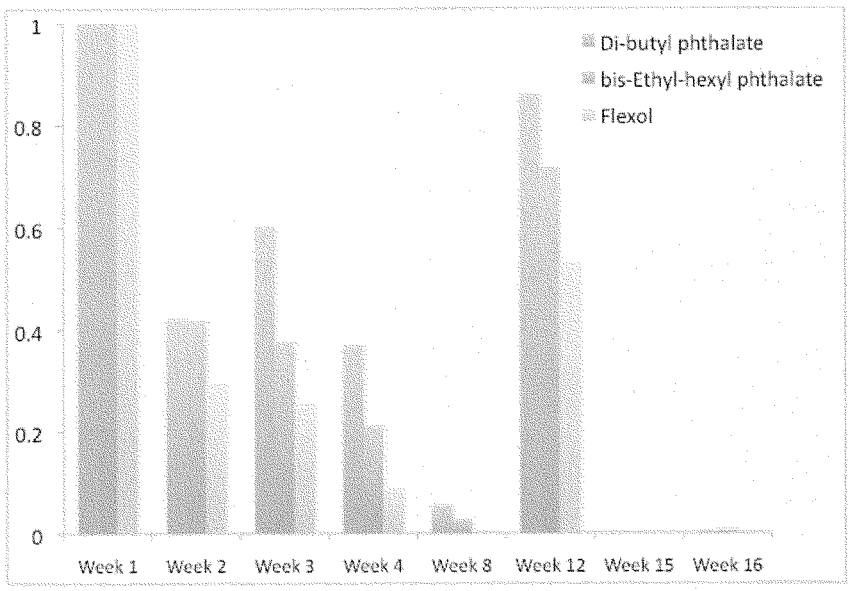


Figure. 3. Phthalate concentration as a function of sample time for fluid samples extracted from Dispenser 1.

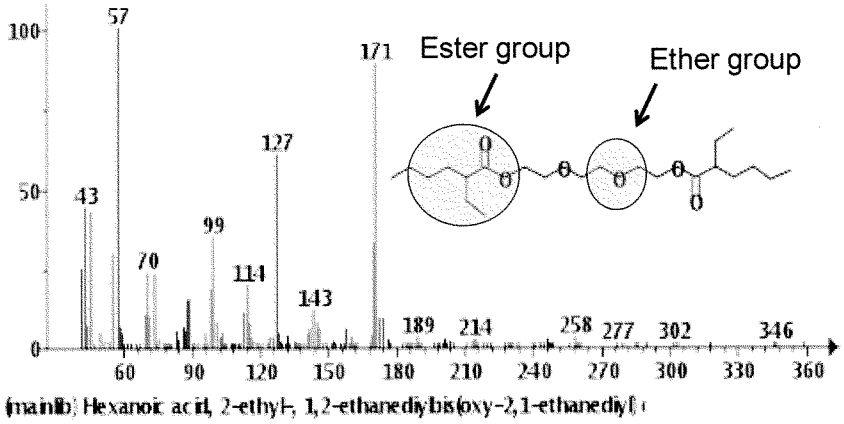
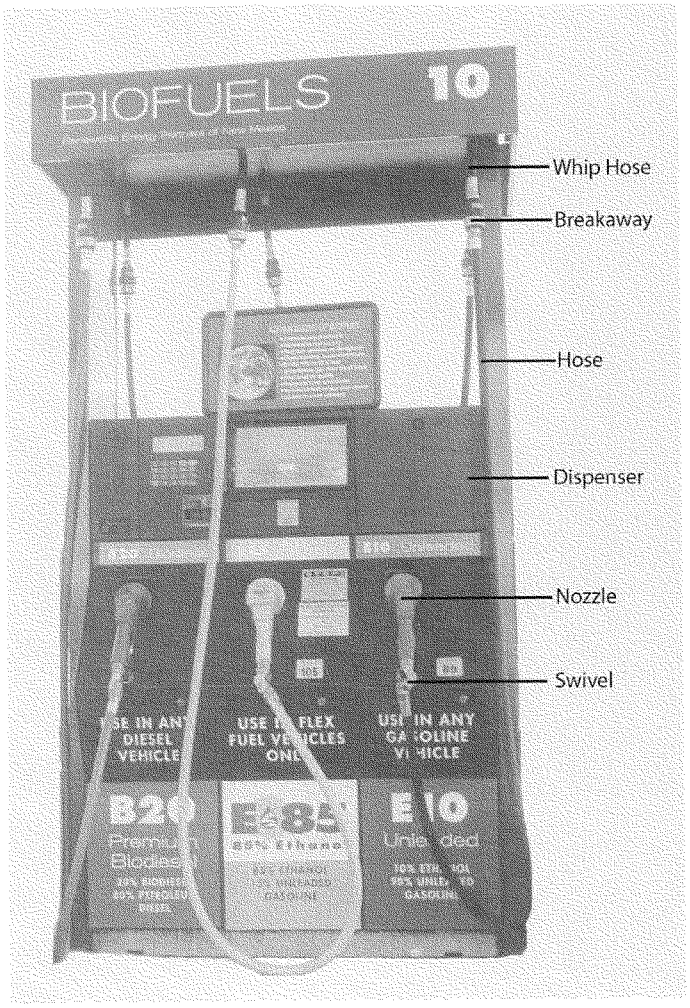


Figure 4. GC-MS graph showing an acid fragment formed by the cleavage of a long chain hydrocarbon elastomer. The ester and ether groups of the hexanoic acid are shown as sites where hydrolysis occurs.

APPENDIX B


BIOFUELS
10
Whip Hose
Breakaway
Hose
Dispenser
Nozzle
Swivel
USE IN ANY DIESEL VEHICLE
USE IN FLEX FUEL VEHICLES ONLY
USE IN ANY GASOLINE VEHICLE
B20
E85
E10
Unleaded

NACS

May 24, 2012

The Honorable John Shimkus
Chairman
Subcommittee on Environment
and the Economy
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Gene Green
Ranking Member
Subcommittee on Environment
and the Economy
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Green:

Thank you for the opportunity to present testimony to the Subcommittee regarding H.R. 4345, the Domestic Fuels Protection Act. The National Association of Convenience Stores (NACS) believes this legislation is a necessary step to allow new fuels to enter the market lawfully and provide consumers with additional choices to fuel their vehicles.

Please find below my responses for the record to questions posed by Representative Waxman. If there are any other questions regarding NACS' position relative to H.R. 4345, I would be pleased to provide additional information.

Questions for the Record Posed by the Honorable Henry Waxman

1. **Is it NACS's position that gasoline retailers should be liable for any costs or harms resulting from leaking fuel tanks for which they are responsible?**

   NACS believes that tank owners and operators should be responsible for any product releases from their underground storage tanks. H.R. 4345 does not change current law in that respect.

2. **With regard to misfueling, is it NACS's position that retailers who act negligently should be liable for the consequences of their negligence? How about reckless misconduct?**

   NACS believes that retailers who act negligently with respect to any component of their operations should be held responsible for their negligence. Without enactment of H.R. 4345, however, even retailers who do everything they are required to do under the law may be held responsible for the independent actions of another party. Our members do not believe they should be held responsible for the actions of another which are beyond their control. H.R. 4345 provides that a retailer will not be held responsible for violating the Clean Air Act or voiding an engine warranty if another person introduces a fuel into a non-approved engine. Appropriately, the bill provides a specific exception to this protection – if a retailer does not comply with the misfueling rules established by the Environmental Protection Agency, then that retailer may be held responsible for violating the Clean Air Act or voiding an engine warranty.

The Association for Convenience & Petroleum Retailing

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3. **With regard to section 4 of the bill, is it NACS's position that the provision should apply narrowly to fuels specifically approved and registered for use by EPA? Should it apply to MTBE? Should it apply to ETBE? What other fuels and fuel additives should it apply to?**

   NACS believes that the product liability provisions of H.R. 4345 should apply only to fuels that are approved and registered on or after 2010, or for which an updated registration has been approved, by the Environmental Protection Agency. Our members must be able to rely upon the rules and regulations to guide their decisions. If EPA determines a fuel is appropriate for commerce and establishes the rules under which that fuel can be sold, our members do not believe they should subsequently be held liable if that fuel is later determined by someone else, for whatever reason, to not be appropriate for commerce. In such circumstances, once the approval and registration is withdrawn, the fuel should be removed from the market. It is NACS position that EPA should not approve a fuel until it has exhausted its evaluation and determined that the fuel is appropriate for commerce.

   NACS does not believe that H.R. 4345 should apply to MTBE or ETBE. The legislation has a specific date after which fuels approved and registered would be subject to the product liability provisions of the bill.

4. **Is it NACS's position that retailers and others responsible for selling defective products should be liable?**

   It is NACS position that retailers and others who knowingly and willfully sell a product that has been determined to be defective should be held responsible. However, parties who produce, distribute and sell products that EPA, the entity designated by the federal government to determine suitablity for use, has approved the use of a fuel, they should not be held liable on a theory of defective product. NACS does not believe that, as a policy matter, it is reasonable to impose retroactive liability on those who complied with the law at the time of their actions. NACS believes that fuels produced, distributed and sold according to the rules and regulations established for that fuel should not be held liable if that fuel is later determined to be inappropriate for commerce. In such cases where an approved fuel is later determined to be inappropriate for commerce, appropriate notification should be provided to all parties and a reasonable period of time should be provided to remove the product from the market.

Again, thank you for this opportunity to provide clarity to NACS position relative to H.R. 4345. If I can provide any additional information, please let me know.

Sincerely,

John Eichberger
Vice President, Government Relations

Charles T. Drevna
President

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May 24, 2012

The Honorable John Shimkus
Chairman
U.S. House Subcommittee on Environment and Economy
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Shimkus:

AFPM appreciated the opportunity to provide its perspective during the April 19th, 2012 hearing entitled "H.R. 4345, The Domestic Fuels Protection Act of 2012." We also appreciate the opportunity to address several questions submitted for the record by Ranking Member Waxman.

1. **At the time that MTBE was used as a fuel additive and stored in underground tanks, was it subject to a control or prohibition under section 211 of the Clean Air Act?**

   Yes. MTBE was registered as a fuel additive with the Environmental Protection Agency ("EPA"). Under the Clean Air Act ("CAA"), no manufacturer or processor may sell, offer for sale, or otherwise introduce a fuel or fuel additive into commerce unless the Administrator has registered the fuel or fuel additive. However, as you stated during your opening statement, this legislation is not intended to impact ongoing MTBE litigation and we would be supportive of an amendment to ensure that ongoing MTBE litigation is not impacted by this proposal.

2. **Is ETBE currently subject to such a control or prohibition?**

   Yes. ETBE was also registered as a fuel additive and subject to the CAA requirements cited above.

3. **Is MMT subject to such a control or prohibition?**

   Yes. MMT has been registered as a fuel additive (HiTEC 3000), subject to the CAA requirements cited above.

4. **Of the more than 7,000 fuel additives that have been registered, can you provide an estimate of what percentage have been tested for mobility in soil and potential for groundwater contamination?**

Unfortunately, AFPM does not track this information. With respect to such testing, EPA's fuel and fuel additive registration authority is contained within CAA section 211(a) and (b). Testing authority for fuels and fuel additives is contained in CAA section 211(e); other subsections of CAA section 211 may be applicable to particular fuels and fuel additives.

In general, fuel additives are registered under EPA's applicable regulations, found at 40 C.F.R. Part 79. In these regulations, the testing requirements that apply to individual fuel additives are defined with respect to three different "tiers." Tier I requirements, found at 40 C.F.R. § 79.52, are mandatory for all fuel additives and require emissions characterization and submission of all available information regarding the health and welfare effects of emissions. Tier 2 requirements, found at 40 C.F.R. § 79.53, impose additional testing requirements for different health endpoints; manufacturers must determine whether available scientific literature contains the results of previous testing regarding carcinogenicity, mutagenicity, neurotoxicity, teratogenicity, reproductive/fertility measures and general toxicity effects of emissions. EPA can determine, under 40 C.F.R. § 79.51, whether additional Tier 3 testing is required under 40 C.F.R § 79.54.
In Tier 3 testing, EPA may require additional testing "when remaining uncertainties as to the significance of observed health effects, welfare effects, and/or emissions exposures from a fuel or fuel additive mixture interfere with EPA's ability to make reasonable estimates of the potential risks posed by emissions for the fuel or additive products." Under 40 C.F.R. 79.54(g), a manufacturer may be required to provide information with regard to the "environmental partitioning of such emissions to the air, soil, water, and biota." Very broadly, the extent of testing required for a fuel additive will therefore vary with respect to the type of fuel additive, the research and testing already completed on the same or similar fuel additive and EPA's review of the additive.

Please feel free to contact me or my staff with any questions. Again, thank you for the opportunity to share AFPM's views.

Regards,

Charles T. Drevna

cc: The Honorable Henry Waxman
The Honorable Gene Green

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