National Marine Manufacturers Association

January 3, 2011

**VIA ELECTRONIC MAIL**

Office of Air & Radiation
U.S. Environmental Protection Agency
6102T, 1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: Docket ID No. EPA-HQ-OAR-2010-0448 – National Marine Manufacturers Association Comments to the U.S. Environmental Protection Agency Regarding the "Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs; Proposed Rule"**

National Marine Manufacturers Association ("NMMA") is pleased to provide the U.S. Environmental Protection Agency ("EPA") with comments regarding the Agency's Proposed Rule for "Regulation to Mitigate the Misfueling of Vehicles and Engines With Gasoline Containing Greater than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs" (75 Fed. Reg. 68,043 (Nov. 4, 2010)).

NMMA is the nation's leading recreational marine industry association, representing nearly 1,300 boat builders, engine manufacturers, and marine accessory manufacturers. NMMA members collectively produce more than 80 percent of all recreational marine products made in the United States. With nearly 13 million registered boats (and nearly 16 million boats in the field) and 70 million boaters nationwide, the recreational marine industry is a major consumer goods and services industry that contributed $30.5 billion in new retail sales and services to the U.S. economy in 2009 and generates nearly 340,000 jobs nationwide.

## I. INTRODUCTION

NMMA strongly opposes EPA's October 13, 2010 Notice of Partial Waiver decision ("Decision") relating to Growth Energy's ("Petitioners") petition to the Agency under Clean Air Act Sec. 211(f)(4) on March 6, 2009 requesting a waiver for ethanol-gasoline blends of up to 15 percent ethanol by volume ("E15"). NMMA strongly opposed—and continues to oppose—the granting of a "partial" or "conditional" waiver for E15 or any other ethanol blend level over ten percent ethanol ("E10") because it will substantially increase public confusion and lead to persistent misfueling and consequent engine performance failures, emissions control failures, and



444 North Capitol Street, NW, Suite 645
Washington, D.C. 20001
202.737.9750 Fax 202.628.4716
nmma.org

consumer safety concerns. It is clear that the fuel waiver process under Sec. 211(f)(4) never contemplated such a partial approach, and EPA has failed to seriously address the substantial practical and legal implications of its issuance of the partial waiver.

Petitioners clearly failed to meet the requisite statutory burdens outlined under Sec. 211(f)(4) to justify a decision by EPA to grant a waiver for E15, or any other ethanol blend above 10 percent. EPA subsequently denied the petition for marine and other non-road applications, as well as older motor vehicles.

NMMA concurs with EPA's various assessments in its Notice of Partial Waiver Decision (75 Federal Register 68,093 (Nov. 4, 2010)) that prompted the Agency to deny the petition for marine engines and equipment, as well as a substantial portion of the on-road and non-road vehicle and engine fleet. In summary, EPA made several conclusions with which NMMA agrees:

- "Growth Energy provided only limited information in support of their waiver request application regarding the potential emission impacts of E15 on nonroad products" (75 Federal Register 68,093).

- "Growth Energy did not submit any test data that evaluated how the use of E15 would impact evaporative emissions and evaporative emissions controls for nonroad products, either for immediate emissions impacts or long-term evaporative emission impacts (durability)" (75 Fed. Reg. at 68,093).

- "Notable gaps [in Growth Energy's petition] include information regarding marine engines, snowmobiles, recreational vehicles, motorcycles, and several classes of small nonroad engines" (75 Fed. Reg. at 68,093).

- "Regarding marine and nonroad engines, "[e]even in areas in which Growth Energy provided data, those data were very limited. Since Growth Energy has not provided information to broadly assess the nonroad engine and vehicle sector . . . it is not possible for the Agency to fully assess the potential impacts of E15 on the emission performance of nonroad products" (75 Fed. Reg. at 68,093 ).

- "At a minimum, a comprehensive nonroad test program would be needed to support Growth Energy's assertions. We know of no such programs underway" (75 Fed. Reg. at 68,093).

- "We do not believe the information provided by Growth Energy adequately addresses materials compatibility for E15 use in nonroad products" (75 Fed. Reg. at 68,093).

- "Growth Energy has not provided sufficient data and information to broadly assess the performance of all nonroad products while using E15" (75 Fed. Reg. at 68,093).

- "Additionally, based on our own engineering judgment, after review of all available data for nonroad products, we find that there are emissions-related concerns with the use of

> E15 in nonroad products, particularly regarding long-term exhaust and evaporative emissions (durability) impacts and materials compatibility issues. Therefore, the Agency has concluded that it cannot grant a waiver for the use of E15 in nonroad products based on existing data" (75 Fed. Reg. at 68,093).

EPA's analysis of the complete absence of supporting technical and scientific documentation supplied by Petitioners in their waiver request relating to marine engines and boat fuel systems is fully consistent with NMMA's analysis in its formal written comments to EPA, as well of the analysis of other engine industry organizations and the Alliance for a Safe Alternative Fuels Environment ("AllSAFE"), of which NMMA is a member. However, EPA's decision to partially approve E15 for new motor vehicles poses substantial problems for the boating and marine manufacturing community relating to consumer confusion, misfueling, and the long-term availability of compatible gasoline.

## II. MISFUELING RISK UNIQUELY HIGH FOR RECREATIONAL MARINE CONSUMERS

Currently, there are nearly 13 million registered recreational boats in operation in the U.S. No gasoline marine engine—or any other marine equipment including gasoline generators—currently in the field was designed, calibrated, certified or is warranted to run on anything over 10 percent ethanol. EPA's own "engineering judgment," as well as all available data, strongly suggest that all of the 12.8 million registered boats on the water today (with the exception of approximately 260,000 diesel-powered boats and the roughly 430,000 registered non-motorized craft) may be negatively impacted by any gasoline with more than a 10 percent ethanol blend. While EPA's denial of the waiver for marine applications was appropriate, its secondary proposed regulations to mitigate misfueling are deficient and counteract the express purpose of the waiver denial for nonroad engines and equipment.

The risk of misfueling is uniquely high in the recreational marine sector for a variety of reasons NMMA has previously brought to EPA's attention. For example, the overwhelming majority of recreational boats are towable and refueled at regular automotive gas stations—95 percent of recreational boats are less than 26 feet in length. Boaters typically avoid fueling at marina or on-water fuel docks because the premium paid for fueling at a marina can run between seventy five cents and one dollar and fifty cents. Marina fuel docks are also relatively rare in terms of overall fuel stations. Additionally, many boaters utilize portable fuel tanks to fill up their secondary marine equipment, such as generators, small-horsepower motors that power small vessels such as Jon boats, or personal watercraft ("PWC"). EPA's proposal fails to contemplate the risk of misfueling in cases where portable fuel tanks are the primary mechanism to obtain fuel. Ultimately, boaters put the same gasoline in their boats as they put in their cars, trucks, and outdoor power equipment. EPA's current policy pathway to "bifurcate" the fuel supply will, in our judgment, substantially confuse consumers and jeopardize the performance of their products, and potentially their safety.

Indeed, EPA explicitly acknowledges the significant likelihood of widespread consumer misfueling in the NPRM, stating that "[f]or nonroad products [which includes marine] and for motorcycles the misfueling concerns include not only the potential for elevated exhaust and

evaporative emissions but also the potential for engine failure from overheating. . . we believe that emissions related problems could potentially occur with enough frequency that the resulting emission benefits from avoiding misfueling would outweigh the relatively low cost imposed by the proposed regulations." 75 Fed. Reg. at 68,046. Additionally, EPA acknowledges that the "potential for misfueling incidents exist because consumers tend to choose the lowest priced fuel, and E15 may cost less than E10 since ethanol currently tends to be less expensive than gasoline." 75 Fed. Reg. at 68,056. Fuel price is especially salient for boat operators.

NMMA concurs with EPA's analysis that the likelihood for misfueling is high. Over time, misfueling will become inevitable unless EPA undertakes regulatory action to ensure compatible fuels remain available and affordable to owners of products for which E15 is expressly prohibited. NMMA strongly urges EPA to consider additional misfueling mitigation measures beyond a label. While NMMA will offer suggestions to improve and strengthen EPA's proposed label below, we do not believe—and EPA has not proved—that a pump label by itself will have any meaningful effect on preventing misfueling.

## III. NMMA SUGGESTIONS TO STRENGTHEN EPA PROPOSED LABEL

As NMMA argued at EPA's public hearing on Dec. 16, 2010 in Chicago, IL, EPA's current label proposal is deficient for several reasons. The E15 label as currently proposed does not constitute a warning label for the following reasons: (1) it does not conform to American National Standards Institute ("ANSI") warning label standards; (2) it does not identify the specific nature of the hazard; (3) it does not indicate clear or sufficient preventative action by the operator; (4) it is not "sufficiently strong enough" to capture the user's attention; and (5) usage of the word "might" does not reflect EPA's own conclusion that E15 **will** damage marine engines and equipment (as outlined above). Additionally, stating the fuel may damage "vehicles and engines" does not effectively or clearly communicate the danger or legal prohibition to boaters since it is not reasonable to assume a boat owner will act as though his vessel (or marine engine) is a vehicle.

EPA has provided no data to prove the efficacy of the proposed label, especially among the high number of existing point-of-sale labels already competing for consumers' attention. Throughout the NPRM, EPA consistently asserts that the Agency "believes" the label will sufficiently mitigate the risk of misfueling, but it provides no data point or any supporting documentation to provide warrant to that assertion. Based on the dockets alone, it appears EPA undertook no formal focus groups, nor consulted with any human factors expert, to gauge the efficacy of its proposed label. NMMA would encourage EPA to test its proposed label to an audience of consumers in order to discern whether the label is communicating information effectively. NMMA offers the following specific recommendations to strengthen the proposed E15 label:

(1) *Ensure Uniform, National Labeling.* NMMA strongly supports a clear, concise, strong and standard warning label across all retail fuel pumps selling E15. These labels should be placed directly above or below (or next to) the button a consumer would use to select the fuel grade. This placement should be tested for highest visibility and mandated consistently across all fuel pumps. Additionally, EPA should require uniform, visible

colors and standard fonts and font sizes for all labels. EPA should also incorporate standard images that communicate to consumers non-verbally, as in a boat or marine engine circled and crossed out to indicate that E15 is not approved for marine use. NMMA supports the using of "WARNING" with the standard ANSI icon indicating potential danger. EPA should work with industry to settle on national, uniform language to outline the specific nature of the danger to operators of unapproved equipment. The label should incorporate language, or somehow communicate, that use of the fuel is (1) illegal for use in marine and other non-road engine applications; (2) will damage the product; (3) will void the product warranty. EPA should incorporate "injury and property damage" into the warning label.

(2) *Conform to ANSI Warning Label Standards; Engage ANSI in Label Development.* As outlined above, EPA has determined that E15 poses serious challenges to marine equipment and is likely to cause performance and durability problems. Unpredictable performance failures in marine applications are highly problematic for boat operators, where engine reliability is crucial to safe boating. Given that EPA has determined a risk exists, and because the U.S. Coast Guard ("USCG"), the marine industry's primary safety regulator, has already expressed serious misgivings about E15 use, EPA should work to ensure that any final label conforms with ANSI Z535 standards, including utilizing standard symbols and icons within the established format as determined by ANSI. EPA should consult with ANSI committees and experts as it develops its label to ensure that the label is consistent with standard practice. ANSI standards are the most credible, most respected, and most widely utilized standards that govern hazard warning. ANSI standards are already utilized at fuel stations.

(3) *Conduct Focus Groups to Test Label Efficacy.* Consistent with ANSI Z535.3 requirements, EPA should conduct a human comprehension test of at least 50 people to make sure that the warning symbols in the final label will achieve at least an 85 percent comprehension rate. EPA should also consult relevant industry partners to test various market segments, such as boaters or outdoor power equipment users specifically. NMMA would be pleased to provide any assistance to the Agency in testing the label with real audiences. EPA should also consider testing the label before a panel of human factors experts, or experts in safety signage and warning language.

(4) *Explicitly State Products for Which E15 is Prohibited.* Because EPA is pursuing an unprecedented bifurcation of the national fuel supply, and because hundreds of millions of existing and future products are not compatible or approved for use with E15, EPA should create a label specifically indicating which products are approved and which are not approved, and why. NMMA suggests that this label include standard images or icons of a range of products—boats, lawnmowers, heavy-duty trucks, snowmobiles, motorcycles, old autos, new autos, etc.—with corresponding circles and red slashes for unapproved products. These images should be accompanied by language explaining the legal prohibition and communicating the danger—"May Cause Injury or Property Damage," in proximity to a standard warning or hazard icon developed by ANSI.

(5) *Explicitly State Danger, Reason for Federal Prohibition.* EPA has concluded, based on its own engineering judgment and available data (in the absence of full scientific testing as required by the Clean Air Act), that E15 is likely to result in engine damage and increased emissions for unapproved engines and products. EPA has also concluded, based on experience, that fuel consumers are most likely to select the cheapest fuel. Therefore, EPA must develop a label that is "sufficiently strong enough" to deter fuel consumers from selecting an incompatible fuel (E15) that will likely be the cheapest option at the pump. This language should state: "Will Cause Injury or Property Damage" and include standard language and symbols as outlined above.

## IV. NMMA RESPONSES TO EPA REQUESTS FOR SPECIFIC COMMENT REGARDING LABELS

In addition to these recommendations, which are at a minimum necessary to strengthen the E15 label itself, EPA has specifically requested comment on the following questions and issues.

*EPA is seeking comment on requiring the labeling on retail fuel pumps selling E10 or less.*

NMMA supports a standard label that notifies consumers to the amount of ethanol in the fuel they are purchasing, including fuel that contains no ethanol. NMMA supports a standard informational label for E10 or less fuel, such as: "This Fuel Contains Maximum 10% Ethanol. Approved for all Vehicles, Vessels, Engines, and Equipment."

*EPA is seeking comment on labels for so-called blender pumps.*

NMMA supports consistent, robust labeling for all blender pumps advising consumers that a 10% maximum is allowable for marine applications. Blender pumps are inherently confusing and EPA should contemplate limiting blender pumps to existing and future flex-fuel only, separate, segregated fuel pump islands. NMMA strongly discourages any attempt to mingle blender pumps with regular fuel dispensers, as this will substantially contribute to consumer confusion and contribute to widespread inadvertent misfueling. For blender pump labels, NMMA suggests labels with similar text and standard symbols that we have recommended for the E15 label.

*EPA is seeking comment on E85 Labels.*

NMMA supports clear labeling for E85 pumps for flexible fuel motor vehicles. NMMA strongly supports E85 for approved motor vehicles and supports the expansion of fuel retail infrastructure to accommodate the expansion of E85 consumption. The separation of E85 pumps and clear labeling is a model for robust measures to prevent misfueling and establish clarity for consumers. NMMA strongly encourages EPA to limit blender pumps to existing and new E85 fuel terminals, which are separated from gas pumps with approved fuel for all vehicles and engines.

*EPA is seeking comment on "whether E10 labels should be required at a retail station only if and when E15 is made available for sale at a particular retail station."75 Fed. Reg. at 68,052.*

NMMA supports clear labeling in all cases, for all gasoline fuel blends. A label should be required if only E10 is being sold to inform that consumer that that is the fuel blend. This label should be consistent with a uniform, national label.

*EPA is seeking specific comment on where the E15 pump label should be placed "in order to most effectively mitigate misfueling, while at the same time avoid interference with other labels on the pumps." 75 Fed. Reg. 68,052.*

EPA's cognizance that there are numerous other labels on the pump with which this current action has the potential to interfere demonstrates clearly the substantial problems with EPA's label-only approach. Any E15 label should be featured prominently next to, above or below the fuel grade containing E15; should be standard at all fuel pumps in order to reduce misfueling; and should be substantially "sufficiently strong enough" to capture to user's attention and deter misfueling. The risks posed by misfueling are substantial enough to warrant EPA's aggressive enforcement of prominent placement of this label. Additionally, as mentioned above, NMMA supports an electronic keypad system which requires the user to affirmatively confirm that E15 is appropriate for his vehicle, vessel or engine. This electronic confirmation should be mandatory on all gas pumps that have electronic keypad technology. In all cases, the label warning consumers not to use E15 in certain products in engines should be placed directly in the consumer's line of sight on the fuel pump, clearly visible, and with sufficiently strong warning symbols to capture his attention. Should this require fuel retailers to move existing labels or signs on fuel dispensers, EPA should require and enforce the movement of existing labels.

*The Agency "seeks comment on how best to achieve" coordinated labeling requirements with the FTC. 75 Fed. Reg. at 68,053.*

NMMA submitted formal written comment to Federal Trade Commission ("FTC") regarding its ethanol label proposal urging FTC to work closely with EPA on this matter. NMMA firmly believes EPA has primacy of authority of this issue under the Clean Air Act and is more than willing to support EPA in ensuring cooperation from FTC to facilitate coordination on any new ethanol fuel pump labels. We strongly encourage EPA to utilize industry support if necessary to ensure that FTC yields and coordinates with EPA.

*"EPA seeks comment on the appropriateness of a unique misfueling website and of including such a website address on the E15 label." 75 Fed. Reg. at 68,056.*

NMMA believes this would be ineffective. EPA should utilize all available space on a label to communicate clear warnings and information to consumers, as outlined above.

## V. EPA SHOULD CONTEMPLATE ADDITIONAL MISFUELING CONTROLS BEYOND A LABEL

As NMMA has previously argued, **an E15 retail pump label alone is not a sufficient safeguard against consumer misfueling.** Although EPA is contemplating some upstream requirements, such as product transfer documents (PTDs) and a national survey, these upstream

requirements will not serve a meaningful function in preventing misfueling or properly educating the consumer about appropriate, compatible and legal fuels for their equipment.

Indeed, the transition from leaded to unleaded gasoline demonstrates the need for strong misfueling controls, such as physical barriers and new technology to ensure proper, legal fueling. When EPA transitioned for leaded to unleaded fuel, misfueling rates persisted at roughly 12% for almost a decade, even though there was a physical barrier in place. When EPA undertook this transition, it took steps to consider what protections would be adequate to prevent the misfueling of leaded fuels, and the Agency implemented a number of regulatory actions including: (1) a warning label; (2) physical barriers, such as restricted fuel nozzle diameters; and (3) a requirement that compatible fuels be made available at certain fueling stations.

Despite these efforts, misfueling rates persisted for some time. In 1975, overall misfueling rates were at 13.5 percent and persisted at 12.1 percent through 1979. Even 7 years after the regulation in 1982, misfueling rates were still at an overall 5.2 percent. Given EPA's own concerns about the challenges associated with emissions, performance, durability, and safety in unapproved products, what is EPA's overall level of tolerance for misfueling? What would EPA consider an acceptable rate of misfueling, and for how long? Unless EPA indicates its metrics, it is difficult to gauge which misfueling measures are appropriate for the long-term.

EPA has selected the least costly and least effective safeguard in its current proposal: labeling. EPA should reissue the proposal to the docket with additional misfueling controls for public review and comment. EPA should consider the broad range of misfueling controls contemplated in "Evaluation of Measures to Mitigate Misfueling of Mid- to High-Ethanol Blend Fuels at Fuel Dispensing Facilities," a report prepared by Gilson Environmental, LLC for the American Petroleum Institute ("API"). This report identified 18 measures that could be implemented to mitigate misfueling of E15, and outlines feasibility, cost, effectiveness, and other factors.

Specifically, NMMA endorses and encourages full consideration of the following misfueling controls, which could be implemented in addition to a warning label.

(1) *RFID Technology.* NMMA strongly encourages EPA to begin undertaking pilot projects on radio frequency identification ("RFID") technology on vehicles and fuel pumps. This technology, which would be affixed to flex-fuel vehicles and E15-approved MY vehicles, would lock fuel dispensers out of operation for all vehicles, vessels, engines and equipment which lack the RFID tag, which provides data identifying the vehicle and its fuel capability with a corresponding RFID reader outfitting on fuel dispensers selling E15. While new vehicles would be equipped with the RFID tag at the factory, EPA, in conjunction with industry, would need to undertake a retrofit program for past-year approved motor vehicles (unless EPA amends its decision to apply only to prospective vehicles). While somewhat complex, this measure would provide a robust, non-intrusive misfueling safeguard and be highly effective. Over time, this will ensure that appropriate fuel is being used, and significantly reduce the risk of hazards and consumer backlash with mid-level ethanol and other biofuels.

(2) *Electronic Key Pad Confirmation.* In addition to a label, EPA should require all fuel stations dispensing E15 to require affirmative confirmation from consumers that they wish to purchase E15. This can be easily accomplished through a mandatory electronic key pad approval (tied to payment method or fuel grade selection), which the consumer would need to confirm prior to purchase. The electronic keypad would include a message similar to that outlined on a final label. EPA should prohibit the sale of fuel containing more than 10% ethanol from older fuel pumps that do not have electronic keypads.

(3) *Cashier Lockout for Mid-level Blends.* In this scenario, fuel dispensers selling E15 or other mid-level ethanol blends will be available to dispense fuel only after to customer speaks with the cashier to unlock the pump. The cashier would need to be informed of compatible vehicles, engines, and equipment and only unlock the pump once it is determined that the consumer has approved equipment. Industry or EPA can provide a directory of approved vehicles to the cashier. The cost for this safeguard is low, and the API study indicates that effectiveness would be high, the cost low, and the implementation schedule short. In cases where a boat is being towed, the cashier would need to confirm with the customer that the fuel is not approved for any marine vessel and, if used, may cause injury or property damage. In addition, because the fuel pump is dispensing E15, a label will be in place to advise the consumer as an additional information/ warning source.

(4) *Segregated Pumps/Blender Pumps Only/Flex-Fuel Only.* EPA should consider mandating that E15 or other mid-level ethanol blends can only be sold at separate, segregated, clearly-labeled fuel islands. For existing E85 pumps, or where blender pumps can be incorporated, this would represent a long-term solution to EPA's decision to bifurcate the nation's fuel stream. It would also be fairly obvious to consumers that a separate pump, which would be clearly labeled, is only for certain approved motor vehicles.

## VI. CONSUMER EDUCATION EFFORT MUST BE EPA-LED, RECEIVE FEDERAL GOVERNMENT RESOURCES

NMMA concurs with EPA's analysis that a public education and outreach campaign is crucial to the success of any misfueling mitigation effort. Unfortunately, the NPRM contains no specific public education proposal. Instead, EPA suggests—wrongly—that an E15 education and outreach campaign would be comparable to the recent industry/EPA effort to educate professional truck drivers about Ultra-Low Sulfur Diesel ("ULSD") through a stakeholder collaboration called the Clean Diesel Fuel Alliance ("CDFA"). Numerous other organizations more qualified than NMMA on the program have pointed out the various ways the ULSD program is not analogous to the E15 fuel stream bifurcation.

With respect to E15, EPA simply assumes that "all parties that may be involved in bringing higher gasoline-ethanol blends to market would participate in a coordinated industry-led consumer education and outreach effort." 75 Fed. Reg. at 68,056. However, as made abundantly clear at EPA's recent public hearing in Chicago, ethanol producers and corn-industry groups will

seek to aggressively market E15, and in fact many stated for the record that no label was necessary, or that only an informational label was needed.

As NMMA indicated at the public hearing, some in the ethanol manufacturing industry have already undertaken misleading marketing efforts specifically directed toward boaters. For example, Growth Energy misleadingly includes an image of a boat—suggesting compatibility of E15 in marine equipment—on its website DrivingEthanol.org. Growth Energy also includes numerous articles on its website that seek to debunk or question the challenges ethanol poses for marine and other equipment. When the boater consumer advocacy organization BoatU.S. issued a consumer notice about EPA's pending decision on E15, Growth Energy circulated a press statement attacking BoatU.S.

NMMA offers its support to any public outreach and education effort, but that effort must be meaningful and Agency-supported and led. EPA and other relevant federal agencies should seek funding and additional resources from Congress to establish a program and hire staff in a way that matches the fundamental change to the nation's fuel supply that EPA is undertaking. EPA cannot simply rely on the goodwill of industry stakeholders who have a direct and obvious financial incentive to sell the product to as many consumers as possible, and to promote their product.

NMMA looks forward to EPA presenting a meaningful and specific public education and awareness plan and looks forward to working with the Agency and other stakeholders on that effort.

## VII. EPA MUST ENSURE AVAILABLE, AFFORDABLE COMPATIBLE FUELS REMAIN IN FUEL STREAM

Marine and other non-road fuel use is a relatively small percentage of overall gasoline consumption in the United States. EPA's approval of E15 for a subset of motor vehicles (which appears will expand over time) removes the incentive for fuel stations to maintain a separate tank and pump for non-road vehicles and equipment, since doing so would result in higher fuel costs for the fuel station and reduce its operating margin. Additionally, as the Renewable Fuel Standard ("RFS") is implemented over time, gasoline with blends of 10 percent or less ethanol will become increasingly less available. Either way, as has occurred with E10, which now saturates 90 percent of the gasoline supply, fuel for non-road engines and equipment will become a specialty fuel at best, raising its cost, discouraging consumers from buying it, and therefore exacerbating the risk of misfueling. The scarcity of compatible fuels will eventually force consumers to misfuel, a major policy problem with EPA's current approach.

Given these challenges, EPA should reconsider its partial waiver and not proceed with bifurcating the nation's fuel supply. However, if EPA persists in pursuing a partial waiver approach, NMMA strongly urges EPA to undertake a companion rule prior to allowing E15 to enter the market that will require that fuel stations continue to sell gasoline blends containing a maximum of E10. This availability issue is at the crux of the misfueling challenge, but EPA is silent on availability requirements in the NPRM.

NMMA urges EPA to utilize its clear authority to require continued availability of compatible fuels for marine engines and other products which are not approved for E15 or other mid-level ethanol blends. EPA clearly has this authority, as utilized in its regulations transitioning from leaded to unleaded gasoline. At that time, EPA took regulatory action to require retail outlets to sell at least one grade of unleaded gasoline in order to provide "certainty" that the fuel would be available and ensure that catalytic converters would not be damaged by misfueling. This regulation was later upheld by the D.C. Circuit in *Amoco v. EPA*, which expressly ruled that EPA was right "not to gamble" and had properly exercised its legal authority to ensure compatible fuel availability. *See Amoco v. EPA*, 501 F.2d 722 (D.C. Cir. 1974). NMMA strongly urges EPA to again use this authority.

## VIII. AFFIRMATIVE DEFENSES TO LIABILITY SHOULD REQUIRE MONITORING OF MISFUELING CONTROLS

In the Affirmative Defenses for Liable Parties section of the proposed rule, EPA addresses the liability of parties who cause misfueling in its proposal and provides affirmative defenses. 75 Fed. Reg. at 68060. The bulk of EPA's efforts in this section is on addressing that the fuel is what it purports to be throughout the marketing stream through testing of the fuel and blend equipment.

EPA has failed in its responsibility to protect the public in this proposed liability scheme, especially for misfueling at self-service fuel retailers. As EPA stated: "With respect to the assessment of liability for the introduction of E15 into any engines, vehicles or equipment that are not covered by the partial waiver for use of E15, EPA would typically not hold a self-service fuel retailer liable for customer misfueling if the retailer has labeled their dispensers appropriately and did not condone or facilitate such misfueling" 75 Fed. Reg. at 68,060. However, EPA has provided no way to assess if misfueling is in fact occurring at those self-serve pumps or defined what "condoning or facilitating such misfueling" would look like. NMMA urges EPA to require self-service retailers to demonstrate that the design of their fuel pumps and signage adequately prevents self-service misfueling errors in order to have the benefit of any affirmative defense.

In addition, EPA should include in its survey a visual monitoring of pumps in order to observe and record customer behavior to determine the rate of actual misfueling. Participation in this survey could be used to meet some of a periodic sampling and testing requirement to have access to a regulated party's affirmative defenses. Lack of participation in such surveys would constitute condoning or facilitating misfueling. In addition, in the field monitoring of self-serve customer fueling should be included in focus group evaluations of any proposed labeling scheme.

## IX. STATE PREEMPTION

EPA states: "a State control or prohibition would be preempted under section 211(c)(4)(A), only if it is "for the purposes of motor vehicle emission control."75 Fed. Reg. at 68,049. EPA further

states that a state rule would not be preempted "unless it is for the same 'characteristic or component of a fuel or fuel additive in a motor vehicle engine' for which EPA has prescribed a control or prohibition under section 211(c)(1)(A)." 75 Fed. Reg. 68,049. NMMA believes that a consistent, nationwide labeling scheme is required to prevent widespread misfueling. Because misfueling of marine engines and pre-2007 (or pre-2001) motor vehicles would have significant adverse affects on these products, including an increase in overall emissions, the partial E15 waiver and the misfueling rule are for purposes of emissions control. NMMA there agrees with EPA's interpretation of the Clean Air Act that any state is preempted enforcing a rule allowing more than 15 percent ethanol to be used in gasoline, or allowing the use of E15 in any vehicle or engine in which EPA has prohibited the use of such fuel to achieve additional emission reductions. NMMA also agrees that any state fuel labeling programs related to E15 would be preempted by Clean Air Act section 211(c)(1)(A).

## X. REID VAPOR PRESSURE (RVP)

EPA in the proposal is denying a 1.0 psi Reid Vapor Pressure ("RVP") waiver for E15, and the Agency is also seeking comment on including an RVP component to its national E15 labeling survey to help ensure that summertime RVP requirements are being met throughout the gasoline distribution chain. NMMA supports EPA's decision to deny the 1.0 psi waiver for E15 and agrees that the Clean Air Act prohibits the extension of this waiver to E15. Additionally, NMMA generally supports nationwide, consistent RVP standards without the 1.0 psi waiver, as well as the requirement for a national RVP survey in non- RFG areas. Prior to 2009, the recreational marine industry did not have to comply with evaporative emission controls. Between 2009 and 2013 boat builders and marine engine manufacturers will have collectively spend millions of dollars to achieve stringent diurnal and permeation emission reductions. The technologies to achieve these standards are based on a RVP of 9.0 psi for EPA and 7.0 psi for California.

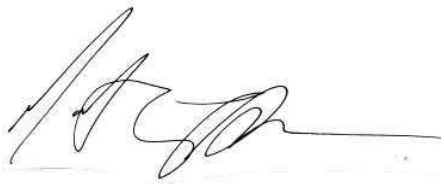
EPA recognizes in the proposed rule that the fuel's vapor pressure is one of the primary variables in determining a fuels evaporative losses. Marine evaporative emission controls are national standards, not specific to attainment or non-attainment areas. Fuel distributors, evaporative emission component manufacturers and the EPA all need to be able to ensure and verify that the fuel that is being sold in the US meets the national RVP fuel standards. Failure to control the vapor pressure of fuel at the consumer level could lead to in use non-compliance with evaporative emission standards.

## XI. CONCLUSION

NMMA appreciates the opportunity to provide comment on this proposed rule. NMMA encourages EPA to withdraw its current proposal and reissue a new proposal that adds additional, robust misfueling controls for consideration in addition to a pump label. Additionally, NMMA encourages EPA to undertake a companion rule to ensure that compatible fuels remain available and affordable to users of those products for whom EPA has not approved E15. If you

have any questions, please contact either Mathew Dunn at mdunn@nmma.org; (202) 737-9760 or Cindy Squires at csquires@nmma.org; (202) 737-9766.

Respectfully submitted,



Mathew P. Dunn
Legislative Director
Government Relations

Cindy L. Squires, Esq.
Chief Counsel & Director of Regulatory Affairs
Government Relations