

Appendix E

Handbook 130, Item 237-3: Engine Fuels and Automotive Lubricants Regulation

Section 3.15. Biodiesel and Biodiesel Blends

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Fuels and Lubricants Subcommittee
c/o Ronald G. Hayes, Chairman
National Conference on Weights and
Measures PO Box 630
1616 Missouri Boulevard
Jefferson City, MO 65102

**Re: Publication 16: 237-3 — Engine Fuels and Automotive Lubricants Regulation, Section 3.15
Biodiesel and Biodiesel Blends**

Dear Fuels and Lubricants Subcommittee:

I write today to clarify and expand on comments made in a January 20, 2010 email to the FLS regarding changes to Handbook 130 Section 3.15 Biodiesel and Biodiesel Blends. The comments also reflect and expand upon API positions that were orally presented during the July 2010 NCWM Annual Meeting.

API Position

API agrees with NCWM that consumers must be protected from unknowingly purchasing diesel fuel containing greater than 5 percent biodiesel by volume. However, API opposes requirements on fuel suppliers to determine and convey the exact percentage of biodiesel in ASTM D975 diesel fuel. API supports with caveat the amended proposal included on L&R 24 in Publication 16 and opposes the draft substitute on L&R 25 in Publication 16. API would like to see the amended proposal on L&R 24 in Publication 16 further amended to say,

3.15.3. Documentation Required on Transfer Documents. The retailer shall be provided, at the time of delivery of the fuel, a declaration of the volume percent biodiesel on an invoice, bill of lading, shipping paper, or other document. It is the responsibility of any potential blender to determine the amount of biodiesel in the diesel fuel prior to blending.

3.15.4. Exemption.

(c) Diesel fuel containing not more than 5% by volume biodiesel fuel is exempt from disclosing the actual percent by volume of biodiesel as required in Section 3.15.3. However, the term "May contain up to 5% biodiesel" shall be used.

API offers the following arguments in support of our request that NCWM not require fuel producers and suppliers to provide the percent biodiesel by volume in D975 diesel fuel to retailers:

percent biodiesel by volume and up to 20 percent biodiesel by volume, then the fuel is to comply with ASTM D7467, Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20).

- Blenders of biodiesel should be responsible for confirming the biodiesel content of the finished fuel and that the fuel complies with the appropriate ASTM specification.
- 16 CFR 306 - Automotive Fuel Ratings, Certification and Posting - explicitly states that "biodiesel blends and biomass-based diesel blends that contain less than or equal to 5 percent biodiesel by volume and less than or equal to 5 percent biomass-based diesel by volume, and that meet American Society for Testing and Materials ('ASTM') standard D975 ('Standard Specification of Diesel Fuel Oils') are not automotive fuels covered by the requirements of [16 CFR 306]."
- If a party desires tax and/or RIN credits for blending biodiesel, then they should be responsible for determining the biodiesel content of the fuel that they are blending.
- Due to the nature of how fuels are delivered to terminals, it is unrealistic to expect terminal operators to provide exact biodiesel content of each transport of fuel being transferred.
- The requirement to disclose the exact biodiesel content on all transfer documents places an undue burden on the distribution system and does not allow for the flexibility needed by the operators of these systems.

Quality Assurance

Product integrity and quality assurance are essential for API member companies to ensure customer satisfaction. API members assure consumers that branded diesel containing up to 5 percent biodiesel by volume sold from their retail stations meets the ASTM D975 specification as required by law. If a party, who is authorized to do so, chooses to materially change the properties of the fuel offered by suppliers by adding biodiesel downstream of their fuel receipt from their supplier, it is the responsibility of that party to ensure that every gallon of the biodiesel blend offered to consumers meets the ASTM D975 specification and/or is in compliance with federal, state and local laws and regulations.

Requiring suppliers to determine the specific volume percentage of biodiesel in the fuel they offer to marketers who wish to then alter the fuel places an unreasonable burden on suppliers. If marketers wish to blend biodiesel into fuel, they should be the responsible party for determining the biodiesel content of the fuel.

Federal Trade Commission Regulation

16 CFR 306 - Automotive Fuel Ratings, Certification and Posting - explicitly states that "biodiesel blends and biomass-based diesel blends that contain less than or equal to 5 percent biodiesel by volume and less than or equal to 5 percent biomass-based diesel by volume, and that meet American Society for Testing and Materials ('ASTM') standard D975 ('Standard Specification of Diesel Fuel Oils') are not automotive fuels covered by the requirements of [16 CFR 306]." Therefore, refiners, importers and producers are not required to "determine" automotive fuel ratings for D975 diesel fuel before they transfer it. Additionally, refiners, importers and producers are not required to

Additionally, 16 CFR 306.4 states that, "no State or any political subdivision thereof may adopt or continue in effect...any provision of law or regulation with respect to such act or omission, unless such provision of such law or regulation is the same as the applicable provision of this title." In other words, the FTC regulation preempts state laws that are not the "same" as FTC rules. Thus, any NCWM efforts to require the determination and/or certification of the automotive fuel ratings for D975 diesel fuel would be advancing efforts that would be in violation of 16 CFR 306.4.

Tax Benefits

Some supporters of requiring that the percent biodiesel by volume in D975 diesel fuel be included on transfer documents cite tax benefits that are allowed to blenders based on the amount of biodiesel per gallon of diesel. These same supporters also cite the Renewable Identification Number (RIN) credit retailers can receive for blending biodiesel downstream of the supplier. These benefits that encourage biodiesel blending reward the party performing the blending, which API supports. However, it should not be the responsibility of a third party, namely fuel suppliers, to aid a downstream blender's assessment of their tax benefit without compensation; nor should it be that third party's responsibility to assure the quality of the final product made in the interests of receiving that credit. This is an undue burden and by no means equitable treatment.

Implementation Concerns

Adequate timing to test and determine the percent biodiesel by volume is an issue that may hinder implementation of a requirement to certify exact biodiesel content for D975 diesel fuel. Some terminals do not necessarily know that their D975 diesel fuel receipt contains up to 5 percent biodiesel because all D975 diesel fuel containing up to 5 percent biodiesel by volume is fungible product and thus may be mixed with other D975 diesel fuel without the need to retest for quality. In some terminals, fungible D975 diesel fuel containing up to 5 percent biodiesel by volume can enter a terminal without the terminal operator's knowledge because it warrants no attention.

D975 diesel fuel, with up to 5 percent biodiesel by volume, may be placed in the same storage tanks as other D975 diesel fuel shipments potentially creating an amalgamation of D975 diesel fuel with differing amounts of biodiesel concentrations. To be clear, this would never result in a D975 diesel fuel surpassing 5 percent by volume in the storage tank. Should the terminal operator be aware of the biodiesel content, the shipment would still be placed in storage with other fungible D975 diesel fuel for efficient use of available storage tank capacity, rather than devoting an existing tank to the D975 diesel fuel with known biodiesel content or constructing a new tank for this purpose. Terminal tank space is currently at a premium, and any efforts to require additional tank space will be opposed by API members. Terminal operators do not have spare capacity to devote to different blends of fungible product nor the acreage to build new tanks. In short, because they optimize their use of existing storage tanks consistent with ASTM standards and Federal code, terminal operators, with the exception of those in jurisdictions with regulations requiring a specific biodiesel volume percentage in the diesel fuel offered, do not know the precise biodiesel content of D975 diesel fuel offered.

There are two ways a terminal operator could determine the biodiesel content of D975 diesel fuel before sale; both of which are costly and time-consuming. The method of greatest burden and cost involves testing the D975 diesel fuel in storage after each delivery to obtain an up-to-date accounting of the biodiesel content. The density of D975 diesel will vary between different fuel deliveries and will often leave different strata of D975 diesel fuel blends within the tank. A stratified tank means that a

terminal operator would not be able to determine the biodiesel content of a tank by performing a simple weighted average calculation. Physical testing would be required to determine the specific biodiesel concentration at a substantial burden and cost to the terminal operator. Further, the frequency with which some terminals receive deliveries of diesel fuel could require testing more than once daily.

Some tanks have stirring capabilities which would alleviate the potential stratification of D975 diesel fuel, but these capabilities are rarely installed on tanks holding fungible grade fuels. Tank stirrers are very expensive and, once installed, require a time-consuming process to operate.

The second method requires the terminal operator to test each load delivered to the tank truck. This method requires the time and expense to complete the test, both of which result in no benefit to the fuel supplier.

It is for all of the reasons above that API supports the disclosure of ranges of biodiesel content consistent with the FTC pump labeling rules: (1) up to 5 percent biodiesel by volume, (2) greater than 5 percent and up to 20 percent biodiesel by volume, and (3) greater than 20 percent biodiesel by volume. However, until FTC amends the Automotive Fuel Ratings, Certification and Posting rule (16 CFR 306) to allow for certification of automotive fuel ratings for biodiesel in these ranges, the NCWM cannot enact a similar change consistent with the requirements of FTC's preemption authority (16 CFR 306.4). Should FTC amend their regulation to reflect API's preferences for disclosure of biodiesel content in accordance with the ranges above, API would urge the NCWM to amend Publication 16 to mirror the FTC regulation consistent with the requirements of 16 CFR 306.4.

Documentation Flexibility

Regarding Section 3.15.3, API opposes efforts to mandate the disclosure of biodiesel content on *all* transfer documents. Fuel providers need the flexibility to determine on which document this information will be included given that the recipient of the order knows which document contains the information. Requiring disclosure on all transfer documents is entirely too inclusive and would be burdensome to fuel providers with no identified benefit.

Conclusion

There are many issues associated with requiring fuel suppliers to determine and label the amount of biodiesel in D975 diesel fuel. In summary, API supports NCWM efforts to inform retailers that D975 diesel fuel may contain up to 5 percent biodiesel by volume, but API opposes requirements to convey the exact percentage under or equal to 5 percent. Additionally, API supports the original wording of 3.15.3 which allows the fuel supplier flexibility in determining on which document to disclose biodiesel content.

Thank you very much for your consideration of our comments. I'd be happy to answer any questions the Fuels and Lubricants Subcommittee may have.

Sincerely,

Brian Knapp