

FINAL STATEMENT OF REASONS

DEPARTMENT OF FOOD AND AGRICULTURE
DIVISION OF MEASUREMENT STANDARDS
SUBMISSION OF REGULATIONS PERTAINING TO
Title 4, Division 9, Chapter 6, Article 5: Engine Fuel Standards
Chapter 7: Advertising of Gasoline and Other Motor Vehicle Fuels

UPDATE OF INITIAL STATEMENT OF REASONS

The Secretary of the Department of Food and Agriculture has determined that no alternative considered would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed action.

The initial statement of reasons is still valid.

CHANGES IN THE REGULATIONS

As a result of internal review and in response to written comments received during the initial 45 day comment period, an additional 15 day comment period, a second 45 day comment period and a second 15 day comment period, changes and modifications have been made to improve the clarity of the proposed regulations. The Department has determined that the modifications have addressed the comment and concerns of the affected private persons and businesses.

The changes to the original text of Article 5, Engine Fuel Standards are as follows:

Section 4140 - definitions for engine fuels was modified to bring the definitions into agreement with ASTM International and Federal Trade Commission definitions for biodiesel, non-ester renewable diesel, and biomass-based diesel.

Section 4145 – interim quality specifications for biodiesel blends greater than 20 volume percent will be established by the Department and remain in effect until such time as ASTM International adopts consensus standards into their Annual Book of ASTM Standards, Section 5. Specifications for non-ester renewable diesel blends were adopted to comply with ASTM International Standard Specification for Diesel Fuel D 975.

The changes to the original text of Chapter 7, Advertising of Gasoline and Other Motor Vehicle Fuels are as follows:

Section 4203 – the proposed cautionary statement for biomass-based diesel and biomass-based diesel blends was deleted.

PUBLIC COMMENTS

Summary and Responses to Comments Received During the Initial 45-Day Comment Period

A total of three letters, telephone calls, or e-mails were received during the comment period.

COMMENTATOR NUMBER 1

California Independent Oil Marketers Association (CIOMA), through its Vice President of Government Relations Jay McKeeman, offered the following comment:

“What would be very helpful is a brief overview that shows label examples, including FTC label requirements. I doubt that the mom & pop’s (and even many of our mid-sized members) have quick access to FTC requirements.”

RESPONSE

The Department agrees that an overview of the required FTC labels showing examples is helpful. Rather than include these in the regulation, the Department has determined that the Division of Measurement Standards’ web sight is a more appropriate location for this valuable information.

COMMENTATOR NUMBER 2

Western States Petroleum Association (WSPA), through its Vice president, Strategic Policy, Fuels, Southwest and Hawaii Regions, Gina Grey offered the following comments:

Comment number 1 – “The reference to D 6751 (B99/100) has been removed. We presume this is because the regulations are meant to address retail fuels and B100 is not a retail fuel. However, Section 4140(a) provides a definition of biodiesel which includes the term B100. We therefore suggest that this inconsistency should be eliminated, possibly by re-including the reference to D 6751.”

Comment number 2 – “Throughout the text there are designations of biodiesel fuel blend levels with the use of a decimal with no zero after it (e.g. 5. vol %.) WSPA would prefer that the regulations delete the decimal points associated with blend levels.”

Comment number 3 – “WSPA recently commented to CARB regarding their proposed revisions to the E85 specifications. We recommend ARB update their specifications by aligning with ASTM E85 standards. ASTM has E85 standards under review with an anticipated completion timeframe of September. We note that DMS is at risk for adopting out-of-date standards as well, since the current package is being approved in parallel with this timeframe.”

Comment number 4 – “The definition of biomass-based diesel should be modified as follows: ‘a diesel fuel ~~substitute~~ registered as a motor vehicle fuel or fuel additive under 40 CFR part 79, produced from nonpetroleum renewable resources that is not a mono-alkyl ester’.”

Comment number 5 – “Section 4203. labeling and Price Sign Advertising Requirements for Biomass-Based Diesel and Biomass-Based Diesel Blends.”

“Although WSPA understands the FTC was directed by the 2007 EISA to establish labeling for biomass-based diesel (RD), WSPA is concerned that these requirements may impact the cost or availability of RD. Such labeling requirements are inappropriate even for blends higher than 20% given the fact that RD is virtually indistinguishable from conventional diesel as a result of the conventional refining process used. In addition, vehicle OEMs have not indicated any warranty concerns via RD use so there is no consumer benefit from a warning label requirement.”

“WSPA believes that California should not require any label for any RD blend level, and we do not believe it is necessary to disclose the presence of RD because it is indistinguishable in terms of its hydrocarbon structure from conventional petroleum diesel. This fact is made even more relevant due to the lack of standard ASTM tests to analyze RD levels. We recommend, therefore, that RD labeling requirements be the same as ASTM D 975 alternative source diesels (e.g. GTL), and that the proposed labeling requirements be deleted.”

RESPONSE

Comment number 1 – The referenced term “biodiesel” in section 4140 is a definition. D 6751 is an ASTM standard for a blending stock put into petroleum diesel to produce biodiesel blends and is not intended to be a stand alone engine fuel standard. ASTM D 7467 includes a provision that biodiesel blends between B6 and B20 be produced with B100 meeting the D 6751 specifications.

Therefore, the Department does not feel that it is necessary to retain the blending stock specification in the regulations.

Comment number 2 – The decimal point after the percent volume indicates that rounding of the blend level after the decimal is carried out to one significant digit. This becomes important for enforcement purposes with blends that are at the 6% or 20% level.

Comment number 3 – The Department adopts by reference the latest ASTM test procedures and standards published by ASTM. Therefore, the Department does not risk adopting out of date standards.

Comment number 4 - The Department concurs. This will assure that the biomass-based diesel and biomass-based diesel blends are an EPA registered fuel.

Comment number 5 – The proposed warning statement for biomass-based diesel and biomass-based diesel blends is not part of the FTC rule, 16CFR Part 306. Since there is no distinguishable difference between conventional diesel and biomass-based diesel, and the OEMs have no engine warranty concerns, the proposed warning label has been removed from the proposal.

COMMENTATOR NUMBER 3

BP Arco, through its Senior Advisor, Regulatory Fuels Issues, Miles Heller offered the following comment:

“BP appreciates the opportunity to comment on the proposed changes to regulation cited above and supports the WSPA comments submitted to the Department on May 17, 2010.”

“In addition to these comments, BP wishes to indicate support for the language proposed by DMS in Chapter 7, Section 4202(b) which contains specific text warning consumers to consult their vehicle owners manual or with the engine manufacturer when the blends are greater the 5% biodiesel (B5). BP understands that most engines have not been approved for use with these blends and believes that the consumer warning is necessary.”

RESPONSE

The Department thanks BP for its comments in support of the regulatory proposal.

Summary and Responses to Comments Received During the First Additional 15-Day Comment Period

A total of three letters, telephone calls, or e-mails were received during the comment period.

COMMENTATOR NUMBER 1

National Renewable Energy Laboratory, USDOE, through Robert McCormick, PhD, offered the following comments:

Comment number 1 – “In Section 4140(d) biomass-based diesel is defined and a requirement of the definition is that it ‘is not a mono-alkyl ester’. I believe this is in error because the federal Energy Independence and Security Act of 2007 in Section 201(1)(D) defines biomass-based diesel as follows:

The term ‘biomass-based diesel’ means renewable fuel that is biodiesel as defined in section 312(f) of the Energy Policy Act of 1992 (42 U.S.C. 13220(f)) and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions...

Clearly it is the intent of this law to include biodiesel as a form of biomass-based diesel, and this is confirmed by subsequent EPA rulemaking related to the renewable fuel standard... This problem or error with the proposed regulatory text could be fixed by simply changing the term ‘biomass-based diesel’, which already has a statutory meaning, to ‘renewable diesel’, which is more consistent with the terminology used in the industry today.”

Comment number 2 – “A second error was made in Section 4148(c) which requires biodiesel blends of more than 20 volume percent to meet the requirements of ASTM D975. The D975 specification categorically only allows fuels that contain up to 5 volume percent biodiesel. Blends above 20 percent are outside the scope of ASTM D975, as D975 was not developed to accommodate the properties of biodiesel at these levels. There currently is no ASTM specification for blends above 20 volume percent.”

RESPONSE

Comment number 1 – The Department recognizes the commentator’s comment and received similar comments from other commentators. Therefore, the Department proposes to change the definition of biomass-based diesel fuel to coincide with the 40 CFR Part 79 definition of biomass-based diesel fuel.

Comment number 2 – The Department recognizes the commentator’s comment and proposes a change to address the concerns.

COMMENTATOR NUMBER 2

Energy Alternative Solutions, Inc., through its President Richard Gillis, offered the following comments:

Comment number 1 – “Excluding biodiesel from the definition of biomass-based diesel is inconsistent with the definition of biomass-based diesel in the federal Energy Independence and Security Act of 2007 which states that ‘biomass-based diesel is biodiesel’ and can be somewhat confusing.”

Comment number 2 – “Section 4203 & 4204 –There is existing law that prohibits engine manufacturers from voiding diesel engine warranties because the owner of the vehicle is using an alternative fuel. Many of these engine manufacturers do recommend the use of a particular biodiesel percentage usually determined by their own testing.”

RESPONSE

Comment number 1 – The Department recognizes the commentator’s comment and received similar comments from other commentators. Therefore, the Department proposes to change the definition of biomass-based diesel fuel to coincide with the 40 CFR Part 79 definition of biomass-based diesel fuel.

Comment number 2 – The Department recognizes the commentator’s comment and feels that it is important to warn consumers that the diesel fuel they are purchasing is not normal petroleum based diesel fuel and that they should take steps to verify that the engine manufacturer has approved its use in that particular engine.

COMMENTATOR NUMBER 3

The National Biodiesel Board, through its Director of State Governmental Affairs Shelby Neal, offered the following comments:

Comment number 1 – “Include the ASTM D6751 specification as part of the definition for biodiesel in section 4140. Meeting the requirements of ASTM D6751 prior to blending is the key to successful biodiesel blends.”

Comment number 2 – “Amend subsections (d) and (e) of section 4140 such that the term ‘biomass-based diesel fuel’ is replaced with the term ‘non-ester renewable diesel fuel’.”

Comment number 3 – “Add a definition for ‘biomass-based diesel,’ a term which is defined in both the federal Energy Independence Security Act of 2007 and further defined in the RFS2 Final Rule as promulgated by the U.S. EPA, Subpart M, Section 8031401 (as published in the Federal Register March 26, 2010).”

Comment number 4 – “Amend section 4148, subsection (c) to allow incorporation of a potential ASTM specification for biodiesel blends above B20 at a future date. Until such a specification is developed, we recommend amending this sub section so that these higher blends can continue to be used in the marketplace through the DMS variance program so long as both parent fuels meet their respective ASTM specifications.”

Comment number 5 – “Add a new section entitled ‘4149 Specifications – Non-ester Renewable Diesel’. These fuels should meet the requirements of ASTM D975 or a prospective ASTM specification designed for non-ester renewable diesel fuels, or fall under the variance in a similar fashion to how DMS is treating biodiesel. Failing to require this segment of the fuel market to meet some type of quality specification would, in our view, be ill advised from both a practical and policy perspective.”

Comment number 6 – “Strike section 4202 subsection (c). The FTC has now addressed this issue via the mandatory federal Fuel Rating Rule labeling requirements, which requires labels on pumps that clearly disclose to consumers when blends of biomass-based diesel above 5 percent are being sold. In our view the proposed DMS labeling requirements are now duplicative.”

RESPONSE

Comment number 1 – The Department recognizes the commentator’s comment and received similar comments from other commentators. Therefore, the Department proposes to change the definition of biodiesel to include the ASTM D6751 specification.

Comment number 2 – The Department recognizes the commentator’s comment and proposes to amend subsections (d) and (e) of section 4140 such that the term ‘biomass-based diesel fuel’ is replaced with the term ‘non-ester renewable diesel fuel’.

Comment number 3 - The Department recognizes the commentator’s comment and proposes to add a definition for ‘biomass-based diesel’.

Comment number 4 - The Department recognizes the commentator’s comment and proposes to amend section 4148(c) to allow for future adoption of specifications for greater than B20 biodiesel blends.

Comment number 5 - The Department recognizes the commentator's comment and proposes to add a new section entitled '4149 Specifications – Non-ester Renewable Diesel'.

Comment number 6 - The Department recognizes the commentator's comment and proposes to strike section 4202(c).

Summary and Responses to Comments Received During the Second 45-Day Comment Period

A total of two letters, telephone calls, or e-mails were received during the comment period.

COMMENTATOR NUMBER 1

Mark-IV Consulting, through Steve Howell and Rebecca Richardson representing the National Biodiesel Board, during a telephone conversation, offered the following comments:

Comment number 1 – “The renewable fuel people, working through ASTM, are looking for a greater than B20 to B99 biodiesel blend specification. Working with DMS and being able to use the information developed during the CEC project with help towards that goal. Linking DMS data with the ASTM Biodiesel subcommittee will be beneficial to both parties.”

RESPONSE

Comment number 1 – The Department recognizes the commentator's comment and will be happy to work with ASTM to develop greater than B20 to B99 biodiesel blend specifications.

COMMENTATOR NUMBER 2

Western States Petroleum Association (WSPA), through its Vice president, Strategic Policy, Fuels, Southwest and Hawaii Regions, Gina Grey offered the following comments:

Comment number 1 – “We remain concerned that the requirement to have the name of the product included in the price sign is not limited to advertising signage in the dispenser pump area but may include street/curbside signs and elevated price signs. We would like clarification that these are excluded from this requirement. We also would like to see the department clarify that these are

requirements for B6 and higher biodiesel blends and do not apply to B5 which is essentially D2 diesel.

Comment number 2 - "WSPA finds the term 'biomass-based biodiesel' confusing in section 4203. We believe 'biomass-based diesel' is appropriate here, since this pertains to renewable diesel."

Comment number 3 - "We believe the labeling restrictions being placed on renewable diesel in section 4203(c) are unreasonable and unnecessary and would request that subsection (c) should be struck. Renewable diesel should not be an issue for either OEMs or consumers. Renewable diesel is indistinguishable in terms of hydrocarbon structure from conventional petroleum diesel."

RESPONSE

Comment number 1 - The Department recognizes the commentator's comment must inform the commentator that the law requires all advertising, dispenser, and storage tank labels to include the brand name, the product identity and the grade of the product.

Comment number 2 - The Department recognizes the commentator's comment and finds that WSPA's concerns with the term 'biomass-based biodiesel' in section 4203(c) are correct and the proposes to remove 'biodiesel' from it.

Comment number 3 - The Department recognizes the commentator's comment and proposes to strike section 4202(c).

Summary and Responses to Comments Received During the Second 15-Day Comment Period

A total of two letters, telephone calls, or e-mails were received during the comment period.

COMMENTATOR NUMBER 1

BP Arco, through its Senior Advisor, Regulatory Fuels Issues, Miles Heller offered the following comment:

Comment number 1 - "I see you did not decide to change the definition of biomass-based diesel to be consistent with the FTC regulations. I still believe that there is a potential conflict when the labeling requirements for biomass-based diesel reference FTC requirements, but the two rules have different definitions for biomass-based diesel."

RESPONSE

Comment number 1 – The Department recognizes the commentator’s comment and proposes to amend the definition of biomass-based diesel to make it consistent with the FTC definition.

COMMENTATOR NUMBER 2

The Engine Manufacturers Association, through Roger Gault, offered the following comment:

Comment number 1 – “The proposed change to eliminate section 4203(c) related to labeling biomass-based diesel and biomass-based diesel blends highlights a conflict in the definition of biomass-based diesel in section 4140(f). Specifically, the definition of biomass-based diesel includes either biodiesel or non-ester renewable diesel. However, section 4202 includes specific requirements for labeling, etc. for biodiesel and biodiesel blends whereas section 4203 includes specific requirements for biomass-based diesel and biomass-based diesel blends. Prior to the proposed revision, the requirements in sections 4202 and 4203 aligned, minimizing potential conflicts, but the proposed revision could allow a biodiesel blend to avoid the labeling requirement stipulated in section 42029c) by claiming the blend was a biomass-based diesel blend.

If the proposed regulatory change does proceed it should include a revision to the definition of biomass-based diesel in section 4140(f) to exclude biodiesel. If the definition change is not possible due to conflicting regulatory requirements for biomass-based diesel then the proposed revision to section 4203(c) should not be implemented.”

RESPONSE

Comment number 1 – The Department recognizes the commentator’s comment and proposes to amend the definition of biomass-based diesel to make it consistent with the FTC definition.

LOCAL MANDATE DETERMINATIONS

The Secretary of the Department of Food and Agriculture has determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Section 17561 of the Government Code to local agencies or school districts, no other discretionary costs to any local agency, and no cost savings in federal funding to the State will result from the proposed regulations. The Secretary has also determined that the regulations do not impose a mandate on local agencies or school districts.

The Secretary has also determined that these proposed changes would result in no significant adverse economic impact to small businesses nor is there a significant housing cost impact pursuant to Government Code Section 11346.55. In addition, the Secretary has determined that these proposed changes would result in no minimal costs to private businesses or individuals affected by the proposed changes.

ALTERNATIVE CONSIDERED

In adopting these regulations, the Department has determined that no alternative, other than this proposal, would be more effective and/or less burdensome to the affected private persons or businesses in carrying out the purpose for which the regulations are proposed.

PUBLIC HEARING

No public hearing was requested nor held on these proposed changes.