Growth Energy Comments on New York Department of Agriculture and Markets' Proposed Rulemaking: Fuels for Use in Automobiles and Motor-Driven Devices and Equipment

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Emily Skor
Chief Executive Officer
Growth Energy
701 8th Street NW
Suite 450
Washington, DC 20001
(202) 545-4000

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I. INTRODUCTION.

Growth Energy respectfully submits these comments on the New York Department of Agriculture and Markets' (the "Department's") proposed rulemaking entitled "Fuels for Use in Automobiles and Motor-Driven Devices and Equipment."[1] Growth Energy is the world's largest association of biofuel producers, representing 100 U.S. plants that each year produce more than 8 billion gallons of cleaner-burning, renewable fuel. Together, our members are working to bring better and more affordable fuel choices at the fuel pump to consumers and protect the environment for future generations. We remain committed to helping our country diversify our energy portfolio to grow more green energy jobs, sustain family farms, and reduce the costs of transportation fuels for consumers.

Growth Energy strongly supports the Department's proposal to permit the sale of E15, a gasoline product comprised of gasoline and 15 percent ethanol, in New York. Growth Energy believes that this proposal serves the people of New York by aligning New York with standard-setting organizations, the federal government, and the vast majority of other states by allowing New Yorkers access to a cleaner, cheaper form of gasoline that will boost the agricultural economy in New York, benefit the environment, and save consumers money, among other benefits. These comments address background information regarding the use of E15 in the United States (including its approval by the United States Environmental Protection Agency ("EPA")), discuss the benefits of E15, and counter misperceptions regarding the fuel.

Briefly, with respect to the latter, E15 can be used in over 90 percent of today's vehicle fleet.[2] However, to the extent alternative types of engines (vehicles older than 2001, non-road engines) may not accept E15 and/or EPA has not approved E15 for those engines, other alternatives (E0, E10) will still be available. It also should be emphasized at the outset that the Proposed Rule simply updates New York regulations to align with the federal government, ASTM, and other states to provide New York drivers a cleaner, lower-cost fuel alternative. Finally, Growth Energy disagrees with the Proposed Rule's unnecessary blanket prohibition on midlevel ethanol blends for the reasons explained below.

A. Background

The Department's current role in regulating gasoline dates back to October 7, 1992, when the Department adopted regulations governing petroleum product quality in New York State pursuant to the Agriculture and Markets Law.[3] The regulations, for example, mandate petroleum product specifications and testing procedures and require petroleum product sellers to maintain

[1] Fuels for Use in Automobiles and Motor-Driven Devices and Equipment, NYS Register, Vol. XLI, Issue 30 (proposed July 24, 2019) ("Proposed Rule").
[2] Air Improvement Resource, Inc., Analysis of Ethanol-Compatible Fleet for Calendar Year 2019 (Aug. 16, 2018) (attached as Exhibit 1).
[3] 14 N.Y. Reg. 1 (Oct. 7, 1992).

product inventory records and certify product quality. The Department's current regulations place a cap on the alcohol content of fuels of 10 percent by volume;[4] however, the alcohol cap is not mandated by statute and was likely implemented to align New York State with federal law at the time that allowed a maximum of 10 percent ethanol in gasoline.[5]

In 2010 and 2011, federal law on ethanol content changed. EPA raised the allowable ethanol content in gasoline for use in model year 2001 and newer light duty vehicles to 15 percent based upon a thorough analysis by both EPA and the United States Department of Energy ("DOE") on E15's impact on engines.[6] In the intervening years, the vast majority of states have removed caps on ethanol (to the extent such caps existed in state law) to allow for use of E15 in all 2001 and later model year conventional gasoline vehicles, not just flex fuel vehicles ("FFVs").

Additionally, in 2016, the American Society for Testing and Materials ("ASTM") modified its gasoline standard to accommodate E15.[7] New York statute directs the Department to align state gasoline regulations with the National Institute of Standards and Technology and ASTM "insofar as practicable."[8] The Proposed Rule would accomplish this mandate by updating the ASTM specification for gasoline from the 2012 version to the 2018 version, which accommodates E15.[9] This action, coupled with removal of the 10 percent ethanol cap, will bring the Department's gasoline regulations into alignment with ASTM, EPA, and the vast majority of other states. Accordingly, we agree strongly with the Regulatory Impact Statement's ("RIS") reasoning that "there is little reason why New York should not allow its consumers to purchase [E15] that not only have met with widespread consumer acceptance elsewhere but have, also, been approved for use by the [DOE], the EPA, and [ASTM]."[10]

II. BENEFITS OF LIFTING NEW YORK'S E15 BAN.

Removing the state's outdated ban on the sale of E15 offers a range of benefits to the environment, New York consumers, and New York's agricultural economy, as detailed in the RIS and explained below.

A. Environmental Benefits

Ethanol-blended fuels provide, at low cost, substantial GHG emissions benefits. Specifically, recent life cycle analyses show that corn starch ethanol reduces GHG emissions by approximately 40 percent as compared to petroleum, and additional analyses predict that these

[4] 1 N.Y.C.R.R. § 224.3.
[5] 44 Fed. Reg. 20,777 (Apr. 6, 1979).
[6] 75 Fed. Reg. 68,095 (Nov. 4, 2010); 76 Fed. Reg. 4,662 (Jan. 26, 2011).
[7] *See* ASTM D4818-16b; ASTM News Release (June 2, 2016) *available at* https://www.astm.org/newsroom/revised-astm-international-specification-gasoline-incorporates-15-ethanol-blend.
[8] New York Agriculture and Markets Law § 179(3)(b).
[9] *See* Proposed Rule, § 224.3(a).
[10] New York Department of Agriculture and Markets, Regulatory Impact Statement ("RIS") at 5, *available at* https://www.agriculture.ny.gov/regulatory_impact_statement_%20for_Petroleum_Quality_Regulations.pdf.

reductions may increase to 50 percent or more by 2022 with ongoing innovations in corn cultivation and biorefinery practices.[11] Cellulosic ethanol provides even more substantial GHG benefits, essentially eliminating the greenhouse gas impacts of liquid fuel.[12] As such, E15 is the lowest GHG gasoline product on the market that can be used in the vast majority of vehicles.

Especially in light of New York's passage of the Climate Leadership and Community Protection Act with its ambitious and sweeping GHG reduction targets, ethanol-blended fuels such as E15 must play a central role in transportation sector GHG reduction programs "to the benefit of public health and welfare."[13] In other states such as California and Oregon with regulatory programs oriented towards curbing GHG emissions associated with fuels, ethanol-blending in gasoline has been critical to the viability of the programs and their ability to achieve additional carbon intensity reductions. For example, in the California Low Carbon Fuel Standard program, ethanol provides over one-third of all GHG credits.[14] Without ethanol, such programs would not be able to achieve GHG reduction targets and would do so at a higher cost to consumers and regulated parties.[15]

Further, the additional ethanol in E15 provides air quality benefits by replacing carcinogens and toxic additives such as benzene found in the petroleum-portion of fuel.[16] Ethanol also reduces carbon monoxide and ozone.[17] Moreover, higher-level ethanol blends such as E15 have *lower* evaporative emissions than the predominant fuel on the market, E10.[18]

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[11] USDA/ICF Study, "A Life-Cycle Analysis of the Greenhouse Gas Emission From Corn-Based Ethanol" (Sep. 2018), *available at* https://www.usda.gov/oce/climate_change/mitigation_technologies/LCA_of_Corn_Ethanol_2018_Report.pdf (attached as Exhibit 2); S. Mueller, "Updated Life Cycle Greenhouse Gas Data for Corn Ethanol Production" (Mar. 2016), *available at* http://illinoisrfa.org/wp-content/uploads/2017/06/UIC-OIG-3_16_v2-1.pdf (attached as Exhibit 3); M. Wang et al., Argonne National Labs, "Well-to-Wheels Energy Use and Greenhouse Gas Emissions of Ethanol from Corn, Sugarcane, and Cellulosic Biomass for U.S. Use" (Dec. 2012), *available at* http://iopscience.iop.org/1748-9326/7/4/045905/pdf/1748-9326_7_4_045905.pdf (attached as Exhibit 4).

[12] *Id.*

[13] RIS at 6.

[14] California Air Resources Board, *Data Dashboard- Figure 2 Alternative Fuels Volume and Credits, available at* https://www.arb.ca.gov/fuels/lcfs/dashboard/dashboard.htm.

[15] Other forms of domestic transportation energy have struggled to develop widely-accessible infrastructure. *See, e.g.*, "EV Market Share," *available at* https://evadoption.com/ev-market-share/. Liquid renewable fuels compatible with the nation's current fueling infrastructure are the only option for clean, domestically produced energy in the transportation sector for the foreseeable future.

[16] UC Riverside Study, "Impacts of Aromatics and Ethanol Content on Exhaust Emissions from Gasoline Direct Injection (GDI) Vehicles" (Apr. 2018) (attached as Exhibit 5); H. Weichang Yuan, et. al, "Comparison of real-world vehicle fuel use and tailpipe emissions for gasoline-ethanol fuel blends," FUEL, Volume 249, Pages 352-364 (2019) (attached as Exhibit 6); J. Yang, et. al., "Investigation of the effect of mid- and high-level ethanol blends on the particulate and the mobile source air toxic emissions from a GDI flex fuel vehicle" (Dec. 2018) ENERGY FUELS, 2019331429-440 (attached as Exhibit 7).

[17] S. Mueller, et. al., "The Impact of Higher Ethanol Blend Levels on Vehicle Emissions in 5 Global Cities" (Nov. 2018), *available at* http://www.erc.uic.edu/assets/pdf/UIC5cities_HEALTH_Nov12_Final.pdf (attached as Exhibit 8).

[18] V.F. Andersen, et. al., "Vapor Pressures of Alcohol-Gasoline Blends," ENERGY & FUELS 24(6): 3647–3654 (2010) (attached as Exhibit 9); American Petroleum Institute, "Determination of the Potential Property Ranges of Mid-Level Ethanol Blends" (Apr. 2010) (attached as Exhibit 10).

Finally, these environmental benefits associated with E15 and higher-level ethanol blends have been realized while protecting wildlife habitats and ecosystems. Although some try to assert the contrary, total land acreage devoted to corn farming has remained constant since the 1930s. Increases in yield have allowed farmers to meet greater demands for food and fuel using the same amount of land.[19] Indeed, substantial additional ethanol production (3 billion gallons + compared with 2017 levels) is possible today without any conversion of new land to corn crop cultivation, and that figure stands to increase over time as corn yields continue to increase.[20] Further, water usage for corn crop irrigation has decreased over time and fertilizer/pesticide use has plateaued even as corn harvest has increased substantially.[21] These modest and decreasing impacts contrast with the substantial adverse environmental impacts of petroleum exploration and refining.[22]

In sum, we strongly agree with the Department that it is appropriate to afford New York consumers the opportunity "to purchase and use more 'environmentally-friendly' fuels."[23]

B. Benefits to New York Consumers

E15 offers consumers a lower-cost, higher-octane gasoline option. For motorists, the value proposition of E15 is clear. Drivers typically save up to 10 cents per gallon, while E15's superior octane rating provides better engine performance for vehicles that benefit from higher octane fuel.[24] Thus, removal of the regulatory barrier to consumer access to E15 will give consumers additional choice at the pump; however, no consumers would be *required* to purchase the fuel, and in all states where retailers offer E15, alternative gasoline options such as E10 and E0 remain available.[25] Further, the RIS's assessment that only refiners/distributors/wholesalers/retailers that *choose* to offer E15 will incur costs under the Proposed Rule is accurate. Just as the Proposed Rule entails no requirement that consumers purchase E15, there is no requirement that retailers elect to offer it. E15 is a lower-cost fuel choice than Regular 87 octane gasoline to which millions of consumers across 30 states have access, and to which New York consumers should also be allowed access. As simply and

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[19] Ramboll, "The RFS and Ethanol Production: Lack of Proven Impacts to Land and Water" (August 2019) (attached as Exhibit 11); K. D. Reitsma, et. al., "Does the U.S. cropland data layer provide an accurate benchmark for land-use change estimates?" AGRONOMY JOURNAL, 108(1), 266–272 (2016) (attached as Exhibit 12); J. B. Dunn, et. al., "Measured extent of agricultural expansion depends on analysis technique." BIOFUELS, BIOPROD. BIOREFINING, *11*(2), 247–257 (2017) (attached as Exhibit 13).

[20] *See* Growth Energy Comments on EPA's Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes, 19 n. 97 (August 20, 2019), EPA Docket No. EPA-HQ-OAR-2019-0136-0021.

[21] *See supra* Ramboll.

[22] E. Parish, et. al., "Comparing Scales of Environmental Effects from Gasoline and Ethanol Production," ENVIRONMENTAL MANAGEMENT (2013) 51:3017-338 (attached as Exhibit 14).

[23] RIS at 5.

[24] *See* E85 Prices, https://e85prices.com/.

[25] *See, e.g.*, Energy Information Administration, "Almost all U.S. Gasoline is blended with 10% ethanol" (May 4, 2016), *available at* https://www.eia.gov/todayinenergy/detail.php?id=26092.

accurately stated in the RIS, "more choice is better than less" and "consumers [sh]ould decide for themselves what fuels best meet their needs."

Second, with respect to motor vehicle engines, E15's impacts were thoroughly evaluated by DOE as part of EPA's 2010 and 2011 rulemakings that legalized the fuel in MY2001 and newer light-duty vehicles.[26] DOE's analysis conclusively disproved claims regarding damage to engines associated with the fuel. In particular, DOE's "rigorous, thorough and peer-reviewed study on the impact of E15 fuel" "showed no statistically significant loss of vehicle performance (emissions, fuel economy, and maintenance issues) attributable to the use of E15 fuel compared to straight gasoline."[27] DOE concluded that a Coordinating Research Council study to the contrary was based on "unreliable and incomplete data, which severely limits the utility of the study."[28] Consumers in 31 states have also run more than 10 billion miles on E15 and there have been no reports of engine issues.[29] Finally, E15 has been the fueling choice of NASCAR for the last eight years, including numerous races run at the racetrack at Watkins Glen. Similarly, NASCAR drivers have run nearly 15 million miles using E15 to date and have experienced no mileage loss nor engine issues, but have noticed a slight increase in horsepower.[30] Thus, the octane benefits associated with E15 do not come at a cost of overall engine performance or entail engine damage.

Related to E15's higher octane rating, Growth Energy urges the Department to confirm that the marketing term "Unleaded 88" (used in marketing E15 across the country) is permissible under the Proposed Rule, section 224.9(c). In particular, there is some regulatory ambiguity in that section's verbiage, which requires that certain terms "shall be used on dispensers and street signs," while simultaneously permissively allowing use of "similar terms." Growth Energy's view is that the term "Unleaded 88" provides clarity to consumers regarding the octane rating of the fuel, consistent with the intent of the Proposed Rule, and should be an allowable "similar term" to "Plus," "Extra," and "Mid-grade."

Third, the Proposed Rule requires that E15 will be properly labeled in accordance with federal law to ensure consumers are appropriately and adequately informed of legal and prohibited uses of E15 in order to prevent misfueling.[31] In the close to a decade that E15 has

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[26] *See generally* 76 Fed. Reg. 4,662 (Jan. 26, 2011); 75 Fed. Reg. 68,094 (Nov. 4, 2010).
[27] DOE, "Getting It Right: Accurate Testing and Assessments Critical to Deploying the Next Generation of Auto Fuels" (May 16, 2012), *available at* https://www.energy.gov/articles/getting-it-right-accurate-testing-and-assessments-critical-deploying-next-generation-auto.
[28] *Id.*
[29] *See* Growth Energy, "American Drivers Reach 10 Billion Miles Driven on E15" (June 11, 2019), *available at* https://growthenergy.org/2019/06/11/growth-energy-american-drivers-reach-10-billion-miles-driven-on-e15/
[30] *See* Growth Energy, "NASCAR Tops 7 Million Miles of Racing on American Ethanol Blend" (Mar. 13, 2015), *available at* https://growthenergy.org/2015/03/13/nascar-tops-7-million-miles-of-racing-on-american-ethanol-blend/
[31] *See* Proposed Rule § 224.9(c)(2) (requiring compliance with EPA's E15 labeling requirements). EPA recently evaluated and confirmed the adequacy of its E15 labeling regulations. *See* EPA, Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations: Response to Comments at 19 (May 2019), available at https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100WR63.pdf ("We do not anticipate that this action will result in misleading labeling practices. We continue to have labeling requirements for gasoline-ethanol

been legal for sale, consumers have engaged in millions of transactions to purchase the fuel and have driven more than eight billion miles on it without misfueling claims or issues. Indeed, today, twelve of the largest retail chains in the nation offer E15 across 30 states, and in Growth Energy's partnership with these retailers, no misfueling or consumer confusion issues have arisen.[32] Moreover, as noted above, higher octane, lower cost E15 is accepted in over 90 percent of today's vehicle fleet.[33] In sum, the current E15 labeling regime incorporated into the Proposed Rule adequately informs New York consumers and prevents misfueling.

C. Benefits to New York's Economy

New York has an ethanol industry featuring two facilities: Western New York Energy in Medina and Attis Biofuels (formerly Sunoco) in Fulton, representing 135 million gallons of ethanol production, hundreds of millions of dollars of investment; and supporting hundreds of direct and indirect jobs throughout the state. In addition, removal of regulatory barriers to E15 engenders positive impacts on the state's agricultural economy as 135 million gallons of ethanol production supports the purchase of more than 47 million bushels of corn.[34] In addition, potential future cellulosic ethanol development in New York could lead to new ethanol plants and revenue streams for the agriculture and timber industries.

III. A BAN ON MIDLEVEL ETHANOL BLENDS IS UNNECESSARY.

The Proposed Rule proposes to ban midlevel ethanol blends (gasoline blends containing above 16 percent, up to 50 percent ethanol) due to concerns with "consumer confusion" and potential misfueling.[35] Growth Energy disagrees with the proposed ban because it undercuts the potential for such fuels to aid in achieving GHG emissions reductions, and, at bottom, is unnecessary. Midlevel ethanol blends can provide an important option for achieving GHG reductions and, unlike other transportation sector GHG-reduction initiatives, significant infrastructure changes would not be necessary, and complete turnover of the vehicle fleet would not be required, for their widespread use. Moreover, federal regulations are already sufficiently protective. They define "ethanol flex fuel" as "a mixture of gasoline and ethanol containing more than 10 percent but not greater than 83 percent ethanol by volume." 16 CFR § 306.0(o). The Federal Trade Commission has promulgated specific labeling requirements for such fuels. *See* 16 CFR § 306.12. These regulations prevent consumer confusion and ensure consumers are aware of appropriate vehicles and engines that may use such gasoline-ethanol blends. From the

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blends containing more than 10 volume percent and no more than 15 volume percent ethanol promulgated in the [Misfueling Mitigation Rule] which would prevent any misleading labeling.").

[32] Growth Energy, "Progress Report: E15 Rapidly Moving Into the Marketplace" (updated 12/11/2018), *available at* https://growthenergy.org/wp-content/uploads/2018/12/e15-locations-1690-2018-12-11.pdf.

[33] *See supra* note 2.

[34] New York farmers produced 77.9 million bushels of grain corn in 2017, up nearly 6 percent from 73.5 million bushels in 2016 – a $300 million production value. *See* Business Journal News Network, USDA Forecast: New York Corn Production Rose 6 Percent This Year (Oct. 2017), *available at* https://www.cnybj.com/usda-forecast-new-york-corn-production-rose-6-percent-this-year/; *see also* USDA, 2018 State Agriculture Overview, New York, *available at* https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK.

[35] RIS at 12.

RIS, it is unclear why the Department views these federal regulations as inadequate, or why alternative, less drastic measures (such as additional labeling requirements) would not suffice to address the Department's concerns with misfueling and confusion.

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In conclusion, the record before the Department and the reasons articulated in the RIS as well as herein provide ample support for removal of New York's regulatory barrier to consumer access to E15 and for rejection of a ban on midlevel ethanol blends. As proposed, the removal of barriers to access to E15 would provide an affordable fuel that would benefit New York consumers and support New York agriculture. In addition, the proposed rule furthers New York's climate goals by bolstering access to lower-carbon renewable fuels. Thank you for your consideration of these comments.