

# RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency  
01 -the *State Register* issue number  
96 -the year  
00001 -the Department of State number, assigned upon receipt of notice.  
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

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## Department of Agriculture and Markets

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### NOTICE OF ADOPTION

#### Fuels for Use in Automobiles and Motor-Driven Devices and Equipment

**I.D. No.** AAM-30-19-00004-A

**Filing No.** 1000

**Filing Date:** 2019-11-05

**Effective Date:** 2019-11-20

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Part 224 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16(1), 18(6), 179(3)(b), 192-a(1), 192-b(12) and 192-c(13)

**Subject:** Fuels for use in automobiles and motor-driven devices and equipment.

**Purpose:** To conform regulations with Federal requirements; to provide standards for, and relieve confusion in, the sale of new fuels.

**Substance of final rule:** The proposed rule will amend 1 NYCRR Part 224, as follows:

1. Section 224.1 will be amended to add definitions of terms used in amendments to the substantive provisions of Part 224, promulgated pursuant to the proposed rule.

2. Section 224.3 will be amended to require automotive fuel, diesel fuel, and kerosene to comply with current standards developed by the American Society for Testing and Materials ("ASTM"). That section will also be amended to allow for the sale and distribution of gasoline-ethanol

blends that have not more than 15%, and not less than 51%, by volume, of ethanol. Furthermore, that section will be amended to set forth standards for certain fuels; i.e., denatured fuel ethanol, ethanol flex fuels, butanol, butanol blends, biodiesel, and biodiesel blends, for which standards are not presently set forth.

3. Sections 224.4 and 224.7 will be amended to lower the amount of water that may be in the bottom of a retail fuel storage tank from two inches to one inch.

4. Section 224.5 will be repealed and a new section 224.5 added that will set forth disclosure requirements that refiners and distributors of automotive fuels and other petroleum products must furnish to purchasers of bulk shipments of those commodities.

5. Section 224.6 will be amended to, in effect, delete the authority of the Commissioner of Agriculture and Markets to temporarily allow a retailer of petroleum products to sell such products from dispensers that do not set forth the total selling price.

6. Section 224.8 will be amended to require a seller of gasoline that contains more than one percent butanol, by volume, to make certain disclosures.

7. Section 224.9 will be amended to require refiners, producers, distributors, and retailers of gasoline and diesel motor fuel to comply with otherwise-applicable federal regulations relating to octane.

8. Section 224.14 will be amended to conform to presently existing regulations promulgated by the Department of Environmental Conservation, in 6 NYCRR section 613-22, that require retailers to permanently mark "fill ports", in a specified manner, designed to identify the petroleum products therein.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 224.3(d), (e)(1) and 224.9(c)(1).

**Text of rule and any required statements and analyses may be obtained from:** Mike Sikula, Director, Bureau of Weights & Measures, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-3146, email: Mike.Sikula@agriculture.ny.gov

**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Changes to not affect the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement.

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2022, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The New York State Department of Agriculture and Market ("Department") received a total of forty-seven letters and emails that set forth comments concerning the provisions of the express terms of the proposed amendments to Part 224 of 1 NYCRR ("the proposed rule"). A number of commentators supported adoption of the express terms; others, however, objected to various provisions thereof, or made suggestions for additions thereto.

Several commentators, including Growth Energy, the American Coalition for Ethanol, the Renewable Fuels Association, and the Renewable Products Marketing Group, opposed the prohibition upon "mid-level" gasoline-ethanol blends (that is, blends greater than 15% and less than 51% ethanol, by volume) in the proposed amendments to 1 NYCRR § 224.3(a)(2)(i). The Department has decided not to amend this proposed amendment as requested by these commentators. This proposed amendment will expand the number of gasoline-ethanol blends that will be allowed; i.e. it will allow blends up to 15% ethanol (E-15) whereas, presently, blends may not exceed 10% ethanol (E-10). The Department feels that allowing an unlimited number of blends may cause an undue disruption in the marketplace and wants to ensure that consumers have time to become accustomed to E-15 and that the industry has time to research proper infrastructure for E-15. The Department further feels that a gradual

introduction of higher ethanol blends will allow consumers and the industry time to adjust to new fuel choices. The Department intends, however, to closely monitor the marketplace and will consider, at some future point, allowing additional blends if the marketplace adapts well to the introduction of E-15.

Two commentators, including the American Motorcyclist Association and the American Petroleum Institute, opposed allowing E-15 because they believe that consumers could become confused when confronted with a multiplicity of fuels and could accidentally pump E-15 into the wrong vehicles, thereby causing engine damage and possibly voiding manufacturer's warranties.

The Department declines to revise this proposed amendment in response to these commentators' objections. Several other states have permitted E-15 to be sold and there have been no reported cases of "mis-fueling". Furthermore, the proposed rule will require service stations to post a label, compliant with Environmental Protection Agency (EPA) misfuelling mitigation plan requirements, adjacent to the pumps that dispense E-15, that will alert consumers as to which vehicles E-15 can be used in. This requirement will better ensure that "mis-fueling" does not occur.

The Department also declines to revise this proposed amendment because it believes that consumers should have the choice whether or not to use E-15; indeed, many consumers have intentionally purchased flex-fuel vehicles that were engineered for E-15 because they believe it has environmental and/or economic benefits. While the Department is aware that allowing a multitude of ethanol blends all at once could cause an undue disruption in the marketplace, it believes that this proposed amendment strikes an appropriate balance for both consumers and the industry.

A commentator, the American Petroleum Institute, also opposed allowing E-15 because it believes that some service stations have dispensing equipment that is not compatible with E-15, and because it believes certain vehicles, approved by the EPA to use E-15, would nevertheless experience engine damage if they were to use such fuel and may void manufacture warranties.

The Department has decided not to amend this proposed amendment for the reasons set forth above. Simply put, this proposed amendment does not require service stations to dispense E-15; any service station that intends to dispense E-15 will be responsible for addressing any compatibility issues, similar to how the one hundred plus service stations that currently dispense E-85 had to address compatibility issues. Additionally, the Department believes that because the demand for E-15 will be relatively modest, any such service station that does not have equipment compatible with E-15 will not, most probably, be at a significant competitive disadvantage if it does not offer such fuel for sale.

Furthermore, consumers will not be required to purchase E-15 and it is highly unlikely that any consumer who chooses to use E-15 in a vehicle approved by EPA will cause damage to his/hers vehicle's engine due to such use; EPA utilizes procedures that are generally – accepted in the relevant scientific community as reliable to make determinations of this type and there is no reason to believe that such determinations are inaccurate.

Several commentators, including the American Motorcyclist Association, the American Petroleum Institute, and the New York Snowmobile Association oppose allowing E-15 because they believe that consumers could become confused when confronted with a multiplicity of fuels and could accidentally pump E-15 into their boat, snowmobile, lawn mower, etc., thereby damaging their engines and possibly voiding manufacturer warranties; the Department declines to revise this proposed amendment for the reasons set forth above.

A commentator, the New York Association of Convenience Stores, expressed a concern that allowing E-15 might lead to limited availability of fuels that are presently offered for sale. The Department declines to revise this proposed since it believes that the industry will continue to supply fuels to meet consumer demand and consumer demand, will likely, continue to be varied. Furthermore, to the extent that consumers continue to demand other fuels, there is no reason to believe that service stations that chose to offer E-15 for sale will not continue to offer such other fuels for sale as well.

A commentator, the New York Snowmobile Association, suggested that the proposed rule should require service stations to "color-code" the nozzles of pumps that dispense E-15 and also suggested that such stations offer pamphlets setting forth the advantage and disadvantages of such fuel. The Department declines to amend the proposed rule as suggested by this commentator; the Department believes that certain provisions of the proposed rule, as well as the currently extant regulations, require service stations to provide sufficient information that will allow consumers to determine which pump(s), if any, dispense E-15. Furthermore, the Department believes that consumers are readily able to ascertain, from easily-accessible and reliable sources, the advantages and disadvantages of using E-15; there is, therefore, no compelling reason to require service stations to incur the cost of providing such information. Additionally, this proposal allows multiple fuels, including E-10 and E-15, to be dispensed from the

same nozzle, so requiring nozzles to be color coded would put an undue burden on the industry.

The New York State Association of Convenience stores inquired as to the reason why the word "retail" was added to a subdivision (f) of 1 NYCRR § 224.4, so that that section would require that there could be no more than a certain amount of water in "retail storage tanks" rather than, as subdivision (f) presently provides, in "storage tanks" in general. The Department decided to add the word "retail", in the context, to clarify that the requirement in this section has historically been construed by the Department as applying only to "retail storage tanks". This change was made following feedback from one of the three workshops held earlier this year where the Department met with concerned people, explained the intent of revising the existing regulation and heard their concerns.

Two commentators, including the American Petroleum Institute and the Renewable Fuels Association, suggested that the proposed rule shall be amended so that certain current versions of documents published by ASTM International should be substituted for older versions thereof that are presently incorporated by reference in 1 NYCRR Part 224; the Department has amended the proposed rule to incorporate two more current versions (i.e., ASTM D 4806-19a and D 5798-19b) and has declined to amend the proposed rule to incorporate two other more current versions (i.e., D 4814-19 and D 975-19b) since these versions do not set forth provisions that are substantively different from the versions currently so incorporated.

A commentator, Growth Energy, requested assurance that the term "unleaded 88", commonly used in marketing to describe E-15 offered at retail and which has an octane level of 88 or greater, would be permitted in the proposed addition of a new 1 NYCRR § 224.9(c)(1). The Department agrees that the requirement set forth in proposed new 1 NYCRR § 224.9(c)(2) is too restrictive and has amended that proposed provision so that it does not prohibit the use of the term "unleaded 88", as well as other equally descriptive terms, when they are used on dispensers and street signs to refer to that fuel.

A commentator, the New York Association of Convenience Stores, opposed the proposed amendments to 1 NYCRR § 224.4(f) and § 224.7(c) that would lower the maximum water level that may be in a retail storage tank from 2" to 1". The Department has decided not to revise this proposed amendment as requested by this commentator. This proposed amendment will functionally require service stations to implement corrective action when retail storage tanks indicate a water level above one inch; early and timely action will better ensure that the fuel in such tanks is not compromised by coming into contact with and absorbing added water. Finding water levels in excess of one inch in storage tanks at service stations is rare and is generally considered a sign of poor housekeeping or some type of abnormal condition that should be addressed sooner rather than later. Furthermore, the Department is aware of twenty-four other states that have a standard for the maximum amount of water that may be in a retail fuel storage tank and none of them allow more than 1" of water in such tanks.

A commentator, the American Collation of Ethanol, opposed the amendment to proposed 1 NYCRR § 224.8(c) and § 224.9(b)(2) that would require retailers of E-15 and gasoline-butanol blends to post signs that contain certain warnings; this commentator believes that these fuels are less harmful than other fuels and that no such warnings should therefore be required. The Department declines to revise these proposed amendments as requested by this commentator; these proposed amendments will merely conform the Department's regulations to currently existing Federal requirements, thereby facilitating compliance for businesses that dispense fuel in interstate commerce.

A commentator, Buckeye Partners, suggest that 1 NYCRR § 224.3(a) should be amended to authorize the Department to issue waivers that would allow gasoline to have a higher vapor pressure, during non-summer months, than is presently allowed. The Department declines to amend 1 NYCRR § 224.3(a) as requested by this commentator. The Department adopts the vapor pressure requirements in the ASTM standard D4814 and does not believe sufficient reasons have been provided to support allowing gasoline to have a higher vapor pressure allowance during non-summer months. The Department further believes that any incidental beneficial impact upon shippers and distributors of automotive gasoline such as by allowing them, during non-summer months, to obtain and blend gasoline with certain less-expensive components warrants a waiver. Additionally, the Department does not believe such a waiver would provide any noticeable benefit to consumers.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Golden Nematode (*Globodera Rostochiensis*) Quarantine

I.D. No. AAM-47-19-00002-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule: