## FEDERAL TRADE COMMISSION

## 16 CFR Part 311

## Test Procedures and Labeling Standards for Recycled Oil

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** Section 383 of the Energy Policy and Conservation Act of 1975 (''EPCA'') directs the Federal Trade Commission (''FTC'' or ''Commission'') to promulgate a rule prescribing test procedures and labeling standards for recycled oil. The Commission is required to prescribe the rule within 90 days after the National Institute of Standards and Technology (''NIST'') reports to the Commission test procedures to determine the substantial equivalency of processed used oil with new oil distributed for a particular end use. On July 27, 1995, NIST reported the relevant test procedures for engine oil, and on August 28, 1995, the Commission published a notice of proposed rulemaking seeking written comment on its proposed labeling standards. In this notice, the Commission announces its final rule.

**EFFECTIVE DATE:** This rule is effective November 30, 1995. The incorporation by reference of the publication listed in 16 CFR part 311 is approved by the Director of the Federal Register as of November 30, 1995.

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**SUPPLEMENTARY INFORMATION:**

Statement of Basis and Purpose

I. Background

*A. EPCA's Requirements*

The purposes of the recycled oil section of EPCA are to encourage the recycling of used oil, to promote the use of recycled oil, to reduce consumption of new oil by promoting increased utilization of recycled oil, and to reduce environmental hazards and wasteful practices associated with the disposal of used oil.[1] To achieve these goals, section 383 of EPCA directs NIST to develop test procedures for the determination of the substantial equivalency of re-refined or otherwise processed used oil, or any blend of re-refined or otherwise processed used oil and new oil or additives, with new oil distributed for a particular end use and to report such test procedures to the Commission.[2] Within 90 days after receiving a report from NIST, the Commission is required to prescribe, by rule, the substantial equivalency test procedures, as well as labeling standards for such recycled oil.[3] EPCA further requires that the Commission's rule permit any container of processed used oil to bear a label indicating a particular end use, such as engine lubricating oil, so long as a determination of ''substantial equivalency'' with new oil has been made in accordance with the test procedures prescribed by the Commission.[4]

The final rule preempts any other Commission rule or order, and any law, regulation, or order of any State (or political subdivision thereof), if it has labeling requirements with respect to the comparative characteristics of recycled oil with new oil that are not identical to the labels permitted by this rule.[5] Also, no rule or order of the Commission may require that any container of recycled oil also bear a label containing any term, phrase, or description connoting less than substantial equivalency of such recycled oil with new oil.[6]

*B. The Rulemaking Proceeding*

On July 27, 1995, NIST reported to the Commission test procedures for the determination of substantial equivalency of processed used engine oils with new engine oils. The NIST test procedures and performance standards are the same as those adopted by the American Petroleum Institute (''API'') for engine lubricating oils generally, regardless of origin.

On August 28, 1995, the Commission announced for comment its proposed Rule on Test Procedures and Labeling Standards for Recycled Oil.[7] The 30-day comment period closed on September 27. The Commission received 20 written comments in response to its Notice of Proposed Rulemaking (''NPR''). Comments were filed by nine oil producers,[8] five trade associations,[9] the National Association of Consumer Agency Administrators,[10] Ford Motor Company,[11] the County of San Diego,[12] the State of Wisconsin,[13] and two individuals.[14] These comments, and other relevant documents, were placed on the public record of this proceeding,[15] and have been considered by the Commission in adopting a final rule.

II. The Rule

*A. Scope of the Rule*

Section 383 of EPCA directs the FTC to promulgate a rule prescribing: (1) Test procedures for determining the substantial equivalency of processed used oil with new oil for a particular end use; and (2) labeling standards applicable to containers of such recycled oil. EPCA requires the Commission to prescribe the test procedures transmitted to it by NIST. The Commission's proposed rule was limited to automotive engine oil, because thus far NIST has reported test procedures only for determining the substantial equivalency of processed used engine oils with new engine oils.[16]

[1] 42 U.S.C. 6363(a).

[2] 42 U.S.C. 6363(c). Although EPCA does not explicitly define the term ''processed used oil,'' it is defined herein to mean re-refined or otherwise processed used oil or any blend of such oil, consistent with the definition of ''recycled oil'' at 42 U.S.C. 6363(b)(2) (A) and (B).

[3] 42 U.S.C. 6363(d). Recycled oil, as defined in section 6363(b)(2) of EPCA is either (a) used oil from which physical and chemical contaminants acquired through prior use of the oil have been removed by refining or other processing, or (b) any blend of re-refined or otherwise processed used oil and new oil or additives, that, for either (a) or (b), the manufacturer has determined, pursuant to the Commission's rule, is substantially equivalent to new oil for a particular end use.

[4] 42 U.S.C. 6363(d)(1)(B).

[5] 42 U.S.C. 6363(e)(1).

[6] 42 U.S.C. 6363(e)(2).

[7] 60 FR 44712 (Aug. 28, 1995).

[8] Coastal Unilube, Inc. (Coastal), D–2; Enviropur West Corporation (Enviropur), D–4; Exxon Company, U.S.A. (Exxon), D–5; South Coast Terminals, Inc. (South Coast), D–6; Evergreen Holdings Inc. (Evergreen), D–7; Quaker State Corporation (Quaker State), D–8; Pennzoil Company (Pennzoil), D–14; Safety-Kleen Corp. (Safety-Kleen), D–16; Chevron Corporation (Chevron), D–18.

[9] Automotive Oil Change Association (AOCA), D–10; National Oil Recyclers Association (NORA), D–12; American Petroleum Institute (API), D–13; Independent Lubricant Manufacturers Association (ILMA), D–15; Automotive Parts & Accessories Association (APAA), D–17.

[10] NACAA, D–9.

[11] Ford, D–11.

[12] County of San Diego, Department of Agriculture, Weights and Measures (San Diego), E–1.

[13] Procurement Recycling Coordinator of the State of Wisconsin (Wisconsin), E–2.

[14] Robert C. Deitz, Environmentalist (''Deitz''), D–1; David R. Zelnick, President, Zed Industries (''Zed''), D–3.

[15] Commission Rulemaking Record No. R511036. Comments submitted in response to the NPR are coded either ''D'' (indicating that they were filed by nongovernmental parties) or ''E'' (indicating that they were filed by governmental agencies). Information placed on the public record by Commission staff is coded ''B.'' In this notice, comments are cited by identifying the commenter (by abbreviation), the comment number, and the relevant page number(s), *e.g.*, ''Deitz, D–1, 1.''

[16] The letter to the Commission from NIST stated that ''[t]he API publication 1509 tests including the Engine Oil Licensing and Certification System are the test procedures we are recommending to you for the determination of substantial equivalency of re-

In addition, EPCA prohibits the Commission from requiring that any container of recycled oil bear a label containing any term that connotes less than substantial equivalency of recycled oil meeting the NIST standards with new oil.[17]

Nineteen of the 20 comments received in response to the NPR generally supported the Commission's proposed rule as consistent with the policies and purposes of EPCA. One commenter opposed the proposed rule, stating that a consumer has a right to know when oil has been recycled, re-refined or used.[18] However, the commenter suggests a regulatory option that is contrary to the mandate of EPCA.

Seven commenters suggested that the Commission extend the scope of the final rule to include additional end uses.[19] According to these commenters, the industry assumes that re-refined base oils demonstrated to be substantially equivalent to virgin base oils for use in an engine oil are substantially equivalent to virgin base oils for use in any product.[20] Three of these commenters stated that state labeling laws encompass a broader category of automotive fluids (such as automatic transmission fluid and automotive gear oils).[21] As a result, state labeling provisions with respect to these non-engine oils would not be preempted by the Commission's rule, and there would be a discriminatory impact on these other types of oils because they would remain subject to a different regulatory scheme.[22] This, according to these commenters, could result in confusion in the marketplace.[23] It also might create disincentives for lubricant manufacturers to purchase re-refined base oils for use in the blending of automotive fluid products in states with labeling laws that include all automotive fluid products.[24]

Two commenters suggested that the Rule should apply to lubricants for railroad engines, marine outboard engines, stationary diesels, and natural gas engines and compressors.[25] Another commenter suggested that the Rule should also cover used oil sold as fuel, stating that the market for such fuel is approximately 10 times greater than for re-refined lubricants.[26]

The Commission has concluded that until NIST develops test procedures for other end uses, it must limit the scope of the rule to the categories of engine oil that are covered by the API Engine Oil Licensing and Certification System as prescribed in API Publication 1509 (passenger car motor oils and car and truck diesel engine oils). Other end uses for re-refined oil, such as railroad diesel engine oil, are not covered by the Rule because API Publication 1509 does not contain test procedures applicable to them.[27]

Seventeen of the 19 comments that generally supported the Commission's proposed rule also addressed some specific aspects of the proposal. Those comments, and the Commission's minor modifications to the proposed rule in response to those comments, are discussed below.

*B. Section 311.1 Definitions*

In the proposed rule, the Commission defined the terms ''manufacturer,'' ''new oil,'' ''recycled oil,'' and ''used oil''—the principal terms defined in section 383(b) of EPCA.[28] The proposed rule, however, also included definitions for ''re-refined oil'' and ''processed used oil.''[29]

Five comments addressed the Commission's proposed definitions.[30] Three commenters suggested changing the definition of ''new oil'' to include synthetic oils.[31] The proposed rule referred only to ''oil which has been refined from crude oil.''[32] Two of these commenters noted that synthetic oils are referenced in API 1509 as sources of raw materials for engine oil.[33]

The third commenter noted that ''existing re-refining technology is capable of removing impurities from certain used synthetic oils as well as from used refined crude oil, and used synthetic oils are presently included as part of the input streams to re-refining processes.''[34] According to this commenter, some used synthetic oils, once properly refined, ''serve to improve the fitness of recycled engine oils for particular end uses.''[35] This commenter suggested that the definitions of ''new oil'' and ''used oil'' should refer to synthetic oils.

The Commission has concluded that including synthetic oils in the definitions of ''new oil'' and ''used oil'' furthers the purposes of EPCA in promoting the use of recycled oil, reducing consumption of new oil, and reducing environmental hazards and wasteful practices associated with the disposal of used oil.[36] Accordingly, the definitions of ''new oil'' and ''used oil'' in the final rule now specifically refer to synthetic oils.

Another commenter suggested that the definition of ''re-refined oil,'' which in the proposed rule was defined as ''used oil from which physical and chemical contaminants acquired through use have been removed,''[37] should be changed to specify that ''re-refined oil'' is used oil that has been refined using hydrotreating technology.[38] According to this commenter, one of only two companies in the United States that employ a hydrotreating process when treating used oil, such a clarification would ensure that ''investments in the hydrotreating process are adequately recognized and protected'' and that the ''high quality of re-refined (hydrotreated) products are adequately

refined oils *for the end use of engine lubricating oil*.'' NIST letter, B–1, 1 (emphasis added). In September 1979, NIST forwarded to the Commission test procedures for ''recycled oil used as burner fuel.'' The Commission, however, determined that it was not required to promulgate a labeling rule with respect to burner fuel, because such oil is sold in bulk, not in container form for consumer use as EPCA contemplates.

[17] 42 U.S.C. 6363(e)(2).

[18] Zed, D–3, 1.

[19] Evergreen, D–7, 2; Enviropur, D–4, 2; Quaker State, D–8, 2; NORA, D–12, 3; ILMA, D–15, 3; Pennzoil, D–14, 2; APAA, D–17, 2.

[20] NORA, D–12, 3–4; Evergreen, D–7, 2; APAA, D–17, 1–2 (''when a company purchases re-refined base oil from a supplier, it could very well be used in engine performance, gear lubricants, power transmission fluids, hydraulic oils, or any combination of these products'').

[21] Enviropur, D–4, 2; see also Evergreen, D–7, 2; NORA, D–12, 3–4.

[22] *Id*.

[23] Enviropur, D–4, 2; Quaker State, D–8, 2 (limiting the scope of the final rule to engine oils ''may create some confusion for non-engine lubricant compounders and blenders desiring to use re-refined base oils'').

[24] See, *e.g.*, Evergreen, D–7, 2 (citing Colorado as an example).

[25] South Coast, D–6, 1 (the proposed rule ''would not cover many other industrial applications for which there are established industry or original manufacturer standards''); ILMA, D–15, 3 (the final rule should extend to such lubricants ''by allowing manufacturers to provide test results that the recycled lubricants meet the applicable specifications'').

[26] NORA, D–12, 4. (See note 16, *supra*, regarding prior NIST report regarding burner fuel.)

[27] According to one commenter, individual consumers are not harmed by the exclusion of railroad diesel engine oil ''because these oils are sold to railroads and other equally sophisticated entities that are in a position to ensure that the re-refined oils they purchase are suitable for their intended use.'' Safety-Kleen, D–16, 12.

[28] 42 U.S.C. 6363(b).

[29] 60 FR 44712, 44717.

[30] Enviropur, D–4; South Coast, D–6; Evergreen, D–7; ILMA, D–15; Safety-Kleen, D–16.

[31] South Coast, D–6, 2; ILMA, D–15, 3; Safety-Kleen, D–16, 12–13.

[32] 60 FR 44712, 44717.

[33] South Coast, D–6, 2; ILMA, D–15, 3.

[34] Safety-Kleen, D–16, 12.

[35] *Id*.

[36] 42 U.S.C. 6363(a). Including synthetic oils in these definitions is consistent with some state laws, which specifically refer to synthetic oils in their definitions. See, *e.g.*, Nev. Rev. Stat. Ann. § 590.020(7) (Michie 1995); La. Rev. Stat. § 51:821(B)(6) (1995); Colo. Rev. Stat. § 8–20–213(2)(g) (1995).

[37] 60 FR 44712, 44717.

[38] Evergreen, D–7, 3.

recognized for purposes of consumer protection and awareness.'' [39]

In contrast, two commenters requested that the Commission not specifically refer to any one processing treatment.[40] Enviropur, for example, stated that the FTC should not define ''recycled oil'' by specifying any one treatment method because hydrotreating is not the only method available.[41]

The Commission has determined that the final rule should not specifically refer to hydrotreating or any other processing treatment. The purpose of this rule is to promote the use of ''recycled'' oils that are substantially equivalent to new oils according to the prescribed standards. The Commission has no legal basis for requiring manufacturers to use any one processing technique if there are several techniques that can be used to make substantially equivalent oils. Accordingly, the definition of ''re-refined oil'' has not been changed.

Another commenter suggested that the Commission change the definition of ''recycled oil'' to state that ''[r]ecycled oil does not include used oil which is blended or otherwise treated for energy recovery or incineration.'' [42] The Commission believes such a clarification is unnecessary because such oil is already excluded from the rule. In the proposed rule, the Commission defined ''recycled oil'' as ''processed used oil with respect to which the manufacturer has determined, pursuant to section 311.4 of this part, is substantially equivalent to new oil for use as engine oil.'' [43] Section 311.4 of this part prescribes test procedures only for engine oils.

Accordingly, after considering the comments, the NIST report, and its statutory mandate, the Commission has determined that the final rule shall include all the definitions as proposed in the NPR, with the terms ''new oil'' and ''used oil'' modified to include synthetic oil.

### *C. Section 311.3 Preemption*

The preemption provision proposed in the NPR was based on the language in Section 383(e)(1) of EPCA. The statute provides:

[N]o rule or order of the Commission, other than the rules required to be prescribed pursuant to subsection (d)(1)(A) of this section, and no law, regulation, or order of any State or political subdivision thereof may apply or remain applicable, to any container of recycled oil, if such law, regulation, rule, or order requires any container of recycled oil, which container bears a label in accordance with the terms of the rules prescribed under subsection (d)(1)(A) of this section, to bear any label with respect to the comparative characteristics of such recycled oil with new oil which is not identical to that permitted by the rule respecting labeling standards prescribed under subsection (d)(1)(A)(ii) of this section.[44]

The Commission solicited comment on whether recycled oil labeling requirements specified by law (federal, state, or local) would be affected by the Commission's proposal.[45] Ten commenters directly addressed this aspect of the Commission's proposal, with nine expressing their support for the proposed preemption provision [46] and one opposing it.[47] Two commenters, Safety-Kleen and Sun Coast, listed 17 states they believed would be affected.[48]

#### 1. State Law

The commenters supporting the provision asserted that state labeling requirements applicable to recycled oil impose burdensome and sometimes inconsistent requirements on recycled oil manufacturers.[49] According to these commenters, consistent nationwide labeling standards would reduce compliance costs for manufacturers and distributors of recycled engine oil, eliminate existing barriers to the distribution of such oil in certain geographic areas and distribution channels, and minimize the stigma associated with re-refined lubricants, thus leading to an increase in the use of recycled oil products.[50] Two commenters also suggested that the final rule should preempt state laws that impose additional regulatory requirements on recycled oil manufacturers, such as laws that require such manufacturers to register or certify their products.[51]

Only one commenter, NACAA, stated its opposition to the proposed preemption provision, arguing that states must be able to respond to their own constituencies, and that this provision would weaken many state laws.[52]

EPCA's language shows Congress intended to promote the use of recycled oil by preventing multiple labeling requirements. Further, the legislative history of the Used Oil Recycling Act [53] indicates that Congress did not believe that consumers would be deprived of meaningful information if sellers of recycled oil did not disclose the origin of the oil on the containers. Congress stated that ''the requirement that recycled oil be labeled in a manner indicating its prior use provides no useful information to the consumer concerning the performance of the oil * * * oil should be labeled on the basis of performance characteristics and fitness for intended use, and not on the basis of the origin of the oil.'' [54]

State laws that require specific disclosures (*e.g.*, that the product is recycled) or have specific format requirements (*e.g.*, specific print size requirements for their disclosures) are preempted because they require a label that is not ''identical to that permitted by the [FTC's] rule * * * '' States also may not dictate how manufacturers

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[39] *Id.*

[40] Enviropur, D–4, 2–3; Quaker State, D–8, 1–2.

[41] Comment D–4, 2.

[42] Evergreen, D–7, 4.

[43] 60 FR 44712, 44717 (emphasis added).

[44] 42 U.S.C. 6363(e)(1).

[45] 60 FR 44712, 44716.

[46] South Coast, D–6; Evergreen, D–7; AOCA, D–10; NORA, D–12; API, D–13; Pennzoil, D–13; Safety-Kleen, D–16; AAPA, D–17; Chevron, D–18, 1.

[47] NACAA, D–9.

[48] Ala. Code § 8–17–111 (1994); Colo. Rev. Stat. § 8–20–213 (1995) (requires manufacturers to label recycled oils as such, but allows manufacturers to represent a product made ''wholly or partly from re-refined oil to be equal to or better than a similar product made from virgin oil if the product for sale conforms with applicable API service classifications, API certification mark, and SAE viscosity grades''); Conn. Gen. Stat. § 14–342 (1994); Fla. Stat. ch. 526.01 (1994) (previously used lubricating oil must be labeled as such, but ''[p]reviously used lubricating oils which have been re-refined by a refining process that has removed all the physical and chemical contaminants acquired in previous use and which meets the ASTM–SAE–API standards for fitness for its intended use is not subject to the labeling requirements of this subsection''); Ga. Code Ann. § 10–1–162 (1995); Haw. Rev. Stat. §§ 342N–30, 31 (1994); Idaho Code §§ 37–2514 to 37–2520 (1994); 815 Ill. Comp. Stat. 435/1, 435/2 (1995); Ind. Code Ann. § 16–44–1–1 (Burns 1994); La. Rev. Stat. § 51:821 (1995) (requires manufacturers to label oils ''re-refined'' but also provides that ''a person may represent a product made in whole or in part from re-refined oil to be substantially equivalent to a product made from virgin oil for a particular end use if the product conforms with the applicable API and SAE service classifications''); Md. Code Ann., Bus. Reg. § 10–501 (1995); Mass. Ann. Laws ch. 94 § 295F (Law. Co-op. 1995); Miss. Code Ann. § 75–55–13 (1995); Mo. Rev. Stat. § 414.112 (1994); Nev. Rev. Stat. Ann. § 590.060(4) (Michie 1995) (only recycled or used oil which has not been re-refined must be labeled ''recycled'' or ''used''); N.H. Rev. Stat. Ann. § 339–B:2 (1994); Tex. Occ. Code Ann. § 8606 (West 1995); Wis. Stat. §§ 159.15, 168.14 (1994). The Commission makes no determination at this time as to which, if any, of these state requirements are preempted.

[49] South Coast, D–6, 3; Evergreen, D–7,1; AOCA, D–10, 2; NORA, D–12, 3; API, D–13, 1; Pennzoil, D–14, 2; Safety-Kleen, D–16, 2–3; APAA, D–17, 1.

[50] See, *e.g.*, South Coast, D–6, 3; AOCA, D–10, 2; NORA, D–12, 3; Pennzoil, D–14, 2; Safety-Kleen, D–16, 3; APAA, D–17, 1.

[51] South Coast, D–6, 3; Safety-Kleen, D–16, 11 (citing Florida and Hawaii statutes).

[52] Comment D–9, 1.

[53] Used Oil Recycling Act of 1980, Pub. L. No. 96–463, 94 Stat. 2055 (codified as amended in scattered sections of 42 U.S.C.).

[54] H.R. Rep. No. 96–1415, 96th Cong., 2d Sess. 6 (1980), reproduced at 1980 U.S. Code Cong. & Ad. News 4354, 4356.

convey substantial equivalency (if they meet the specified test procedures for substantial equivalency).

States may adopt labeling requirements identical to those required by the FTC, if they wish, and prosecute violations under state law.[55]

Because preemption is mandated by EPCA, the Commission has no discretion on this issue. The Commission believes that section 383(e)(1) intends that there be one, uniform labeling requirement regarding the comparative characteristics of recycled oil (for a particular end use). If a container of recycled oil is labeled in accordance with the FTC's rule, neither the FTC nor any state or political subdivision may require any additional or different disclosure.

EPCA's preemptive effect is limited to labeling requirements for recycled oil that meets the definition of recycled oil in EPCA (*i.e.*, oil that is substantially equivalent to new oil pursuant to FTC-specified test procedures). Accordingly, the rule preempts only state labeling requirements for engine oils covered by the API Engine Oil Licensing and Certification System as prescribed in API Publication 1509. The rule does not preempt state requirements that are not labeling requirements, such as registration and certification requirements.[56]

2. The FTC's Used Oil Rule

Section 383(e)(2) of EPCA also restricts Commission rules and orders, stating ''the Commission may [not] require any container of recycled oil to also bear a label containing any term, phrase, or description which connotes less than substantial equivalency * * *.'' To some extent this section overlaps with section 383(e)(1) of EPCA. But, whereas section (e)(1) expresses congressional intent that there be a national uniform labeling standard, preempting non-identical state laws, section (e)(2) is specifically aimed at prohibiting Commission label requirements in addition to what the Commission prescribes under section 383(d)(1) of EPCA, if the additional requirements would create the impression that the recycled oil is not substantially equivalent to new oil.

In 1964, prior to the enactment of EPCA, the Commission had promulgated a trade regulation rule on the advertising and labeling of previously used lubricating oil.[57] Based on the Commission's finding that the new or used status of a lubricant was material to consumers, the Used Oil Rule was promulgated to prevent deception of those who prefer new and unused lubricating oil. The Rule required that advertising, promotional material, and labels for lubricant made from used oil disclose such previous use. The Rule prohibited any representation that used lubricating oil is new or unused. In addition, it prohibited use of the term ''re-refined,'' or any similar term, to describe previously used lubricating oil unless the physical and chemical contaminants had been removed by a refining process.[58]

On October 15, 1980, the Used Oil Recycling Act suspended the provision of the Used Oil Rule, as well as any similar provision in a Commission order, requiring labels to disclose the origin of lubricants made from used oil.[59] The legislative history indicates congressional concern that the FTC Rule's labeling requirement had an adverse impact on consumer acceptance of recycled oil, provided no useful information to consumers concerning the performance of the oil, and inhibited recycling. Moreover, the origin labeling requirements in the Used Oil Rule may be inconsistent with the intent of section 383 of EPCA, which is that ''oil should be labeled on the basis of performance characteristics and fitness for intended use, and not on the basis of the origin of the oil.'' [60]

Accordingly, on April 8, 1981, the Commission published a notice announcing the statutory suspension of the origin labeling requirements of the Used Oil Rule and relevant orders. In the same notice, the Commission suspended enforcement of those portions of the Used Oil Rule and Commission orders requiring that advertising and promotional material disclose the origin of lubricants made from used oil.[61] The stay of the Used Oil Rule continues in effect. As part of its regulatory review process, the Commission will consider, at some time in the future, whether the Used Oil Rule should be rescinded in its entirety or otherwise amended.

*D. Section 311.4 Testing*

The Commission proposed in the NPR that, to determine the substantial equivalency of processed used oil with new oil for use as engine oil, manufacturers use the test procedures that were reported to the Commission by NIST on July 27, 1995, entitled ''Engine Oil Licensing and Certification System,'' API Publication 1509, 13th Edition, January, 1995.[62] API operates a voluntary licensing and certification system that is designed to provide consumers with the technical information needed to understand the performance, viscosity, and accepted use of engine oils. Under this system, API licenses two types of ''Marks'' which may appear on the labeling of qualified engine oils: the API Service Symbol [63] and the API Certification Mark.[64]

Six commenters addressed the proposed testing standard. The commenters agreed that substantial equivalency should be based on the test procedures contained in API Publication 1509 as NIST recommended to the Commission. However, since this publication is periodically revised by API to reflect changes in test procedures and standards, the commenters recommended that the final rule require use of test procedures found in the

[55] See, *e.g.*, Ill. Stat. ch. 815 §§ 435/1, 435/2 (1995) (upon promulgation of the FTC's labeling standards applicable to recycled oil, ''the labeling requirements provided in [the statute] shall no longer be in effect and the State labeling standards shall be those promulgated by the Federal Trade Commission'').

[56] For example, Florida requires manufacturers of re-refined oil to register their products with the Department of Environmental Protection and to provide an affidavit of proof that the product meets the required standards. Fla. Stat. ch. 526.01 (1994). Hawaii prohibits persons from marking recycled oil as ''specification fuel without an analysis or other written information documenting that the used oil or recycled oil meets the standards for specification fuel as set forth by the director.'' Haw. Rev. Stat. § 342N–30 (1994). Hawaii also requires transporters, marketers, and recyclers of used oil to obtain a permit. Haw. Rev. Stat. § 342N–31 (1994).

[57] 16 CFR 406.

[58] 16 CFR 406.5.

[59] 42 U.S.C. 6363 note.

[60] See Legislative History, Public Law 96–463, U.S. Code Cong. and Adm. News, pp. 4354–4356 (1980).

[61] 46 FR 20979.

[62] 60 FR 44712, 44714.

[63] The Service Symbol identifies the type of engine in which the oil should be used, explains the oil's characteristics, and describes the oil's ability to protect against wear, sludge, and corrosion. The symbol also contains a rating of the oil's viscosity that is based on specifications established by the Society of Automotive Engineers. Finally, the symbol indicates whether the oil has any energy conserving properties when compared to a standard reference oil.

[64] The API Certification Mark identifies engine oils recommended for a specified use. An engine oil is eligible to receive the API Certification Mark only if it satisfies the minimum performance standards established by the International Lubricant Standardization and Approval Committee (''ILSAC''). To receive ILSAC approval and, in turn, API certification, motor oils must pass a series of tests designed to evaluate the following factors: (1) The oil's performance and its effect on the engine at zero degrees Fahrenheit or lower; (2) the extent to which the oil prevents engine rust and corrosion; (3) the oil's fuel efficiency; (4) the capability of the oil to reduce friction and to protect moving parts within the engine from fusing together; (5) the oil's resistance to thickening under high temperatures up to three hundred degrees Fahrenheit; (6) the level of detergents and dispersants in the oil; and (7) the content of phosphorus in the oil.

''latest'' or ''current'' version of API Publication 1509.[65]

The ''Document Drafting Handbook'' of the Office of the Federal Register, National Archives and Records Administration, contains the rules federal agencies must follow to incorporate materials by reference into regulatory text.[66] Each statement of incorporation by reference in regulatory text must specifically identify the material to be incorporated, including the title, date, edition, author, publisher, and identification number of the publication. The Commission, therefore, does not have discretion to refer generally to the ''latest'' or ''current'' edition of API Publication 1509 in the final rule. If API Publication 1509 is revised and a subsequent edition is published, the Commission may update its incorporation by reference of this document by publishing an amendment to the Code of Federal Regulations in the Federal Register.

Three of these commenters also recommended that the Commission modify the proposed rule to permit third-party testing on behalf of the manufacturer. According to the commenters, additive manufacturers and suppliers or other third parties often perform API tests for lubricant manufacturers. The commenters stated that the Commission's proposal (*i.e.*, that manufacturers use the NIST test procedures to determine substantial equivalency), if left unchanged, would be extremely burdensome on the industry.[67] The Commission has determined that manufacturers may rely on third-party testing conducted in accordance with the procedures contained in API Publication 1509. This could be important to some manufacturers who do not have testing equipment of their own. Accordingly, the final rule states that to determine the substantial equivalency of processed used oil with new oil, manufacturers or their designees must use the test procedures found in API Publication 1509. The allowance for third-party testing, however, does not absolve manufacturers of their ultimate responsibility under EPCA for making substantial equivalency determinations.[68]

In accordance with section 383(d)(1)(A)(i) of EPCA,[69] therefore, section 311.4 of the final rule prescribes test procedures for determining the substantial equivalency of processed used oil with new oil distributed for use as engine oil. The test procedures, as reported to the Commission by NIST, are found in API Publication 1509, 13th Edition, January 1995, entitled ''Engine Oil Licensing and Certification System.'' [70] In its letter transmitting the test procedures to the Commission, NIST stated that the engine test procedures described in API Publication 1509, combined with the API Engine Oil Licensing and Certification System, are accepted for use with automotive engine oils by the Society of Automotive Engineers, the American Society of Testing and Materials, and all major automotive engine manufacturers.

*E. Section 311.5 Labeling*

In accordance with section 383(d)(1)(A)(ii) of EPCA,[71] in the NPR the Commission proposed labeling standards for containers of recycled oil. Section 311.5 of the proposed rule stated that a manufacturer may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for engine use, but only *if* the manufacturer has determined, in accordance with the test procedures prescribed by the Commission, the substantial equivalency of the oil to new oil for that particular end use, and has based the representation on that determination.[72] For example, a manufacturer could represent that its oil is substantially equivalent to new oil by displaying the API Mark on its container. A manufacturer would not be required to add any qualifiers to its label, such as ''used'' or ''re-refined.''

The Commission received seven comments on this aspect of its proposal. Exxon stated that the Commission's proposed labeling standards do not address the extent to which an engine oil may exceed the minimum requirements for such oils in API Publication 1509, and do not address a recycled oil's potential health effects on consumers.[73] With regard to Exxon's first point, the Commission notes that its labeling standards are permissive in nature and do not mandate any specific disclosures. If a recycled oil exceeds the minimum requirements for substantial equivalency with new oil, a manufacturer is free to make such representations on labels, in advertising, or wherever appropriate.

With regard to Exxon's second point, the Commission believes that consideration of the potential health effects of recycled oil is beyond its statutory mandate in this proceeding. It is clear from the legislative history of EPCA that Congress was concerned only with the performance characteristics of recycled oil, not potential health consequences. Section 383(d)(1)(A) of EPCA requires the Commission to prescribe the substantial equivalency test procedures certified to the Commission by NIST. The test procedures reported to the Commission by NIST relate to the performance of oil distributed for use as engine oil. The rule's labeling standards, therefore, are based on substantial equivalency determinations made in accordance with those test procedures. Although Exxon's concerns may be important, they cannot be addressed in this proceeding. The Commission has no factual or legal basis to address the health effects, or any other non-performance qualities, of recycled oil in this rulemaking.

Three commenters suggested that the final rule include affirmative, mandatory labeling requirements.[74] As

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[65] South Coast, D–6, 2; AOCA, D–10, 2; Ford, D–11, 1; API, D–13, 2; ILMA, D–15, 2; Safety-Kleen, D–16, 7.

[66] This Handbook is issued under the Federal Register Act (44 U.S.C. 1501–1511) and the regulations of the Administrative Committee of the Federal Register (1 CFR 15.10).

[67] South Coast, D–6, 3; ILMA, D–15, 2; Safety-Kleen, D–16, 6.

[68] See final rule sections 311.4 and 311.5. Section 383(b)(2) of EPCA (42 U.S.C. 6363(b)(2)) requires manufacturers to make determinations of substantial equivalency. The final rule, therefore, is consistent with EPCA.

[69] 42 U.S.C. 6363(d)(1)(A)(i).

[70] The Commission has obtained approval from the Director of the Federal Register to incorporate this document by reference into section 311.4 of the final rule, as required by section 552(a) of the APA, 5 U.S.C. 552(a), and by regulations issued by the Office of the Federal Register, 1 CFR 51.

[71] 42 U.S.C. 6363(d)(1)(A)(ii).

[72] 60 FR 44712, 44715.

[73] Comment D–5, 1–2 (''Stating that recycled oils are substantially equivalent to new oils without specifically confining that equivalency to performance might imply equivalency in health effects on humans. In contrast to new petroleum base oils, we are not aware of an extensive database on the cancer potential and other health effects to humans posed by recycled base oils * * *. While [typical] contaminants have been rather extensively studied and documented for new oils, the variability of source and effects of re-refining have presented a major challenge for health equivalent documentation for recycled oils. Some equivalency standards for carcinogenic species, adverse health species (i.e., PCB) [and] adverse environmental species (i.e., metals) should be put in place to ensure health equivalence with new oils.''). In contrast, Safety-Kleen stated that tests have shown its re-refined base oils to be non-mutagenic and non-carcinogenic, and that ''although the FTC's mandate to promulgate test procedures does not extend to health-related issues * * * implementation of the proposed rule is consistent with consumers' interest in encouraging the sale of safe and healthful products.'' Comment D–16, 9.

[74] NACAA, D–9, 1 (Recycled or re-refined oil must have an equivalency on the label. The consumer will need to know how these recycled or re-refined oils are equivalent to new oil, and they will need to know its longevity and uses); ILMA, D–15, 3 (ILMA prefers a mandatory labeling requirement because the Commission's proposed rule allows a considerable range in quality of processed used oil); San Diego, E–1, 1 (Used oil's definition and uses must be very clear and stated on the label).

discussed above, in suspending the labeling provision of the Commission's Used Oil Rule, Congress stressed that the intent of section 383 of EPCA was that ''[o]il should be labeled on the basis of performance characteristics and fitness for the intended use, and not on the basis of the origin of the oil.'' [75] Congress intended to encourage the use of recycled oil that is substantially equivalent in performance to new oil. Congress ensured this in section 383 of EPCA by directing NIST to establish standards for determining substantial equivalency and by prohibiting the Commission from requiring manufacturers to label their products with any term, phrase, or description connoting less than substantial equivalency. Accordingly, the Commission does not believe it is necessary to establish affirmative labeling requirements beyond the statutory requirement that representations of substantial equivalency be based on the NIST standards. If the NIST standards are met, the recycled oil is like new oil sold for engine use in terms of minimum performance, and NACAA's concerns, therefore, are implicitly addressed. Thus, the final rule does not require manufacturers to display the API mark on containers or to explicitly state that their engine oil is substantially equivalent to new oil. The Commission believes that manufacturers and sellers will have every incentive to do so, however.

Ford Motor Company advised the Commission of the existence in the marketplace of technically obsolete oils that may not meet modern engine warranty requirements. Ford suggested that such oils should not be permitted to be labeled as substantially equivalent to new engine oil if they cannot be tested in accordance with the test procedures prescribed by the Commission.[76] The Commission agrees, but believes that the rule as proposed already addresses this concern. A representation of substantial equivalency can be based only upon a determination made in accordance with the test procedures prescribed by the Commission.

Another commenter advised the Commission that in some instances, a manufacturer of a recycled engine oil product will sell that finished product in bulk to a distributor or retailer who in turn will label the product with its own label and brand. The commenter recommended that the proposed rule's labeling standards be modified to accommodate these situations.[77] To clarify that other sellers, including, for example, distributors and retailers, may label containers of recycled engine oil in accordance with the rule, the Commission has modified section 311.5 of the rule to refer to such other sellers.

Finally, the Procurement Recycling Coordinator of the State of Wisconsin suggested that the proposed rule's labeling standards conflict with some federal and state procurement guidelines and Executive Order 12873, which require government procurement officials to purchase re-refined oil instead of virgin oil.[78] The commenter stated that it will be difficult to favor re-refined oil, if it is difficult to identify the product.[79] The rule, however, does not preclude manufacturers or other sellers from labeling re-refined oils as such. The labels also could include the percentage of re-refined oil in blended products. Marketers of re-refined engine oil have an incentive to voluntarily label their products as such to attract environmentally concerned or other specifically targeted consumers, including federal or state government agencies.

Accordingly, after considering the comments on its NPR proposal, the Commission has determined that a manufacturer or other seller may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil only if the manufacturer has determined such substantial equivalency in accordance with the test procedures prescribed by the Commission, and has based the representation on that determination. Because the rule does not mandate the use of specific disclosures, recycled oil manufacturers or other sellers have flexibility to promote the performance of their products and their ''substantial equivalency'' with new oil and to develop strategies for various markets. Manufacturers can voluntarily label recycled oil with terms such as ''recycled'' to assist in the marketing of their products.[80]

*F. Section 311.6 Prohibited Acts*

Section 311.6 of the proposed rule tracked the statutory language relating to prohibited acts and enforcement of the Commission's rule. Section 524 of EPCA [81] prohibits violation of the Commission's final rule issued pursuant to section 383 of EPCA.[82] The proposed rule declared that it is unlawful for any manufacturer to represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for engine use unless the manufacturer has based such representation on the manufacturer's determination of substantial equivalency in accordance with the test procedures prescribed under section 311.4 of the proposed rule.[83]

The Commission has revised the proposed rule's prohibited acts section to make it consistent with the change made to the labeling section of the proposed rule. As discussed above, the labeling provision in the final rule (section 311.5) differs from the proposed rule in that it states that a ''manufacturer *or other seller* may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil * * *'' (emphasis added).

Accordingly, section 311.6 of the final rule makes it ''unlawful for any manufacturer *or other seller* to represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil unless the manufacturer *or other seller* has based such representation on the manufacturer's determination that the processed used oil is substantially equivalent to new oil for use as engine oil in accordance with the NIST test procedures prescribed under section 311.4 of this Part.'' (emphasis added).

The final rule, like the proposed rule, also provides that violations will be subject to enforcement in accordance with section 525 of EPCA. Section 525 of EPCA provides that whoever violates the Commission's final rule is subject to a civil penalty of not more than $5,000 for each violation.[84] Whoever willfully violates the Commission's rule shall be fined not more than $10,000 for each violation.[85] Any person who knowingly and willfully violates the Commission's rule, after having been subjected to a civil penalty for a prior violation of the rule, shall be fined not more than $50,000, or imprisoned not more than

[75] Legislative History Public Law 96–463, U.S. Code Cong. and Adm. News, pp. 4354–4356 (1980).

[76] Comment D–11, 1.

[77] Safety-Kleen, D–16, 7.

[78] A 1993 Executive Order requires federal agencies to implement procurement guidelines for re-refined lubricating oil and requires NIST to establish a program for testing the performance of products containing recovered materials. *See* Exec. Order No. 12873, 58 FR 54911 (1993).

[79] Wisconsin, E–2, 1–2.

[80] Manufacturers using such terms should, of course, consider the Commission's Guides for the Use of Environmental Marketing Claims. *See, e.g.,* 16 CFR 260.7(e).

[81] 42 U.S.C. 6394(2) and 42 U.S.C. 6395.

[82] 42 U.S.C. 6394(2).

[83] 60 FR 44712, 44717.

[84] 42 U.S.C. 6395(a).

[85] 42 U.S.C. 6395(b).

six months, or both.[86] Further, pursuant to section 525 of EPCA, whenever it appears to any officer or agency of the United States (in whom is vested, or to whom is delegated, authority under EPCA) that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of the Commission's rule, such officer or agency may request the Attorney General to bring a district court action to enjoin such acts or practices, and upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. A district court also may issue mandatory injunctions commanding any person to comply with the Commission's rule.[87]

Because section 525 of EPCA does not explicitly authorize the Commission to bring enforcement actions, this rule will be enforced by the Department of Justice under 28 U.S.C. 516, which authorizes the Department of Justice to enforce statutes that are not specifically assigned to other agencies for enforcement. The Commission, however, has the authority to investigate violations and make referrals to the Department of Justice pursuant to section 525(d) of EPCA.[88] In addition, the Commission has the authority to prosecute unfair or deceptive acts or practices under Section 5 of the FTC Act, 15 U.S.C. 45, administratively or through Section 13(b) actions, 15 U.S.C. 53(b), filed in federal district court. The Commission may obtain injunctive relief, as well as equitable remedies, such as redress or disgorgement. Therefore, if a manufacturer misrepresents that its oil is substantially equivalent to new oil, the Commission can pursue remedies under Section 5 of the FTC Act, if appropriate.

Four commenters addressed the issue of enforcement. Pennzoil emphasized the importance of ''strict enforcement of the rule'' and ''imposing stiff penalties on manufacturers which misrepresent the equivalency of processed used oil to new oils * * *.'' [89]

API commented that its licensing and certification standards ''assure motorists that API-licensed engine oils meet rigorous requirements.'' [90] API also stated that, in addition to testing oils before they can be marked with the API Service Symbol and Certification Mark, it runs additional tests on engine parts, or simulates engine operation to show how the oil performs in a variety of driving and weather conditions. It also conducts an ''aftermarket audit to monitor use of the license and the symbol it conveys.'' [91]

The Procurement Recycling Coordinator of the State of Wisconsin expressed concern that the API's auditing process might not be adequate.[92] According to this state official, API chooses the brands it audits based on market share volume. Therefore, re-refined brands are unlikely to be chosen because sales are relatively low.[93] This commenter further noted that API failed to provide him with information he requested regarding the performance testing of re-refined motor oil beyond ''the individual manufacturers' assertions that they have met the API requirements.'' [94]

Ford stated that although meeting the requirements of API Publication 1509 ''goes a long way in establishing substantial equivalency, it does not ensure that a manufacturer's oil continuously meets these requirements.'' [95] Ford accordingly suggested that the FTC could adopt a random audit process to ensure continued compliance.[96]

The Commission agrees with the commenters that enforcement of the rule is critical to the protection of consumers, as well as those manufacturers that are following the proper certification and labeling standards, and to the maintenance of public confidence in the performance of recycled oil. Accordingly, the Commission will take whatever steps are necessary to ensure compliance with the rule. Moreover, although the rule does not contain any recordkeeping or reporting requirements, any manufacturer or seller labeling recycled oil pursuant to this rule must be able to demonstrate that the necessary testing has been performed and the determination of substantial equivalency properly made.[97] The Commission's enforcement plan will vary depending on whether the Commission determines that there is a compliance problem. The Commission welcomes any information from persons who believe that the rule is being violated.

III. Effective Date

EPCA directs the Commission to ''prescribe'' the relevant test procedures and pertinent labeling standards within 90 days after the date on which NIST reports such test procedures to the Commission. It does not, however, specify an effective date for the rule. In the NPR, the Commission proposed that the rule become effective 30 days after publication of a final rule in the Federal Register.[98] The two comments on this issue supported the proposed effective date.[99] Therefore, the Commission has determined that the final rule will become effective 30 days after it is published in the Federal Register. This will provide sufficient time for affected parties to comply with the rule's labeling standards or take notice of them.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') [100] requires agencies to prepare regulatory flexibility analyses when publishing proposed rules [101] unless the proposed rule, if promulgated, would not have a ''significant economic impact on a substantial number of small entities.'' [102] In the NPR, the Commission preliminarily concluded that the economic impact of the proposed labeling standards appeared to be *de minimis.*[103] The rule proposed by the Commission, and now made final, permits, rather than requires any container of recycled oil to bear a label indicating that it is substantially equivalent to new engine oil, if such determination has been made in accordance with the prescribed test procedures. Any economic costs incurred by entities that choose to make a determination of substantial equivalency are not imposed by the rule. The rule contains no reporting or recordkeeping requirements, and it permits recycled oil to be labeled with information that is basic and easily ascertainable.

In the NPR, the Commission also tentatively concluded that the proposed rule would not affect a substantial number of small entities because relatively few companies currently manufacture and sell recycled oil as engine oil. Of those that do, the Commission stated that most are not

[86] 42 U.S.C. 6395(c).
[87] 42 U.S.C. 6395(d).
[88] 42 U.S.C. 6395(d).
[89] Pennzoil, D–14, 3.
[90] API, D–13, 4.
[91] *Id.*
[92] Wisconsin, E–2, 2.
[93] *Id.*
[94] *Id.*
[95] Ford, D–11, 2.
[96] *Id.*
[97] In accordance with the Commission's advertising substantiation doctrine, sellers must have a reasonable basis to support material, objective claims. See Thompson Medical Co., 104 F.T.C. 648, 839 (1984) (Appendix), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987).
[98] 60 FR 44712, 44715.
[99] South Coast, D–6, 4; Safety-Kleen, D–16, 13.
[100] 5 U.S.C. 601–612.
[101] 5 U.S.C. 603(a).
[102] 5 U.S.C. 605(b).
[103] 60 FR 44712, 44716.

''small entit[ies]'' as that term is defined either in section 601 of RFA [104] or applicable regulations of the Small Business Administration.[105]

In light of these factors, the Commission certified under the RFA that the rule proposed would not, if promulgated, have a significant impact on a substantial number of small entities, and, therefore, a regulatory analysis was not necessary.[106] To ensure the accuracy of this certification, however, the Commission requested comments on whether the proposed rule would have a significant impact on a substantial number of small entities.

Two commenters specifically addressed this aspect of the Commission's proposal. Both stated that the rule would not have a significant economic impact on a substantial number of small entities.[107] In adopting the final rule, the Commission recognizes that although there may be some ''small entities'' among private-label retail sellers or distributors of recycled engine oil, the rule's labeling standards will have only a minimal impact on these small entities. Any such impact will likely consist of retailers and distributors voluntarily labeling recycled engine oil containers in order to market their products. The impact on such small entities, therefore, is *de minimis* and not significant. In addition, the rule adopted by the Commission does not require recycled oil manufacturers to conduct substantial equivalency tests themselves. They may use third parties, thus obviating the need to have testing equipment of their own. Thus, the rule minimizes burdens on even small businesses.

On the basis of all the information now before it, the Commission determines that the rule will not have a significant impact on a substantial number of small entities. Consequently, the Commission concludes that a regulatory flexibility analysis is not required. In light of the above, the Commission certifies, under section 605 of the RFA,[108] that the rule it has adopted will not have a significant impact on a substantial number of small entities.

V. Paperwork Reduction Act

In the NPR, the Commission noted that its proposed rule contained no reporting, recordkeeping, labeling or other third-party disclosure requirements, so there was no ''information collection'' necessitating clearance by the Office of Management and Budget (''OMB'').[109] However, to ensure the accuracy of its conclusion, the Commission solicited comments on any paperwork burden the proposed rule might impose. The one comment on this issue supported the Commission's conclusion.[110] Accordingly, the Commission has determined that the final rule does not involve the ''collection of information,'' as defined by the regulations of OMB [111] implementing the Paperwork Reduction Act,[112] and, therefore, OMB clearance is not required.

VI. Regulatory Review

The Commission has implemented a program to review all of its current and proposed rules and guides. One purpose of the review is to minimize the adverse economic impact of new regulatory actions. As part of that overall regulatory review, the Commission solicited comments in the NPR on questions concerning benefits and significant burdens and costs of the proposed rule and alternatives to the proposals that would increase benefits to consumers of recycled engine oil and minimize the costs and other burdens to firms subject to the rule's requirements.[113] Only two commenters specifically addressed these issues, and they stated that the rule will impose no adverse economic impact even on any small businesses that might be covered by the rule.[114] Accordingly, the Commission concludes that the rule it has adopted will not impose any significant burdens and costs on firms subject to the rule's requirements.

List of Subjects in 16 CFR Part 311

Energy conservation, Incorporation by reference, Labeling, Recycled oil, Trade practices.

VII. Text of Rule

Accordingly, the Commission amends 16 CFR Chapter I by adding a new part 311 to Subchapter C to read as follows:

## PART 311—TEST PROCEDURES AND LABELING STANDARDS FOR RECYCLED OIL

Sec.



Authority: 42 U.S.C. 6363(d).

### § 311.1 Definitions.

As used in this Part:

(a) Manufacturer means any person who re-refines or otherwise processes used oil to remove physical or chemical impurities acquired through use or who blends such re-refined or otherwise processed used oil with new oil or additives.

(b) New oil means any synthetic oil or oil that has been refined from crude oil and which has not been used and may or may not contain additives. Such term does not include used oil or recycled oil.

(c) Processed used oil means re-refined or otherwise processed used oil or blend of oil, consisting of such re-refined or otherwise processed used oil and new oil or additives.

(d) Recycled oil means processed used oil that the manufacturer has determined, pursuant to section 311.4 of this part, is substantially equivalent to new oil for use as engine oil.

(e) Used oil means any synthetic oil or oil that has been refined from crude oil, which has been used and, as a result of such use, has been contaminated by physical or chemical impurities.

(f) Re-refined oil means used oil from which physical and chemical contaminants acquired through use have been removed.

### § 311.2 Stayed or invalid parts.

If any part of this rule is stayed or held invalid, the rest of it will remain in force.

### § 311.3 Preemption.

No law, regulation, or order of any State or political subdivision thereof may apply, or remain applicable, to any container of recycled oil, if such law, regulation, or order requires any container of recycled oil, which container bears a label in accordance with the terms of § 311.5 of this Part, to bear any label with respect to the comparative characteristics of such recycled oil with new oil that is not identical to that permitted by § 311.5 of this Part.

### § 311.4 Testing.

To determine the substantial equivalency of processed used oil with new oil for use as engine oil, manufacturers or their designees must use the test procedures that were reported to the Commission by the National Institute of Standards and Technology (''NIST'') on July 27, 1995,

[104] 5 U.S.C. 601(6).

[105] 13 CFR 121.

[106] 60 FR 44712, 44716.

[107] NORA, D–12, 5; Safety-Kleen, D–16, 13. Safety-Kleen stated that it is not aware that a substantial number of small entities manufacture processed used oil for sale as engine oil.

[108] 5 U.S.C. 605(b).

[109] 60 FR 44712, 44716.

[110] Safety-Kleen, D–16, 13.

[111] 5 CFR 1320.7(c).

[112] 44 U.S.C. 3501–3520.

[113] 60 FR 44712, 44716.

[114] NORA, D–12, 5; Safety-Kleen, D–16, 13.

entitled ''Engine Oil Licensing and Certification System,'' American Petroleum Institute (''API'') Publication 1509, Thirteenth Edition, January, 1995. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of API Publication 1509, ''Engine Oil Licensing and Certification System,'' may be obtained from the American Petroleum Institute, 1220 L Street, NW., Washington, DC 20005, or may be inspected at the Federal Trade Commission, Public Reference Room, room 130, 600 Pennsylvania Avenue, NW., Washington, DC, or at the Office of the Federal Register,, 800 North Capitol Street NW., suite 700, Washington, DC.

**§ 311.5 Labeling.**

A manufacturer or other seller may represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil only if the manufacturer has determined that the oil is substantially equivalent to new oil for use as engine oil in accordance with the NIST test procedures prescribed under § 311.4 of this Part, and has based the representation on that determination.

**§ 311.6 Prohibited acts.**

It is unlawful for any manufacturer or other seller to represent, on a label on a container of processed used oil, that such oil is substantially equivalent to new oil for use as engine oil unless the manufacturer or other seller has based such representation on the manufacturer's determination that the processed used oil is substantially equivalent to new oil for use as engine oil in accordance with the NIST test procedures prescribed under § 311.4 of this Part. Violations will be subject to enforcement through civil penalties, imprisonment, and/or injunctive relief in accordance with the enforcement provisions of Section 525 of the Energy Policy and Conservation Act (42 U.S.C. 6395).

By direction of the Commission.

Donald S. Clark,

*Secretary.*

[FR Doc. 95–26980 Filed 10–30–95; 8:45 am]

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