

Focus on Fuels

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Volkswagen told us to, "sign and drive" and realized that it was important to be a little more specific. They changed their tag line to, "sign then drive," theoretically (and humorously) to keep people from driving while signing documents to buy a Volkswagen. The words we use and the order in which we use them are important. Laws are written by the legislators and the regulations are written by administrators to apply the intentions of the legislation. The RFS2 regulations are a great example of the importance of the legislation and the regulations.

RFS2 Legislation versus Regulation

by Tom Hogan

TM&C Services in Fuel Regulations

TM&C provides a full range of services in its fuels regulatory practice. Some of these services are listed below:

- Preparing, reviewing and submitting fuels reports, including CDX submissions.
- Facility audits for compliance with fuels programs.
- Interaction with EPA to pose fuels related questions.
- Industry specialist assistance for required gasoline attestations.
- Industry specialist assistance for in-line

Legal Right to Reduce Obligation

The legislation that requires the use of renewable fuels is less than twenty pages long. The regulations spawned by the legislation (the explanatory preambles and descriptive questions and answers) cover hundreds of pages. The recent announcement by the EPA that they intend to propose changes to the RFS2 obligations led us to refresh our memory of the actual legislation. The renewable fuels legislation is in the U.S. Code at Title 42, Chapter 85, Subchapter II, Part A, §7545 (o). The sections that apply to waivers under the program are of special interest in light of the recent EPA intent to propose changes.

The legislature realized that a requirement to use renewable fuels in large quantities could create unforeseen problems. They, therefore, included provisions for specified dates for informed reflection on the program as well as the ability to change the program for specific reasons such as limited supply. The options for changing the volumes are listed below.

1. The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by:
 1. One or more states;
 2. By any person subject to the requirements of this subsection; or
 3. By the Administrator on his own motion by reducing the national quantity of renewable fuel required.

- blending audits.
- Assistance in setting up a fuels compliance group/program.
- Personnel reviews of compliance related groups.
- Compliance status reviews and recommendations.
- Negotiations/consultation during EPA enforcement actions.
- 3rd Party Engineering reviews.
- Due diligence reviews of facilities and companies in RFS RINs Program.

2. Based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement **would severely harm the economy or environment of a state, a region, or the United States**; or
3. Based on a determination by the Administrator, after public notice and opportunity for comment, that **there is an inadequate domestic supply**.

If the Administrator waives:

1. At least 20% of the applicable volume requirement set forth in any such table for two consecutive years; or
2. At least 50% of such volume requirement for a single year; The Administrator shall promulgate a rule (within one year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that **no such modification** in applicable volumes **shall be made for any year before 2016**.

Analysis

The key points are that the EPA may waive or reduce a volume obligation. If the obligation is reduced by 20% in two consecutive years or 50% in a single year, the Administrator shall promulgate a rule modifying the volumes for all subsequent years.

What does all of this mean with the intended proposed 2014 RVOs? 2016 should be a special year. The cellulosic and advanced biofuel RVOs are certain and likely, respectively, to require the Administrator to promulgate a modification to the cellulosic and advanced biofuel obligations through 2022. In addition, it is likely, assuming the EPA approves the proposed RVO calculation method for ethanol, that the renewable fuel RVO, in 2015 and 2016, will meet the 20% criteria and will require the Administrator to promulgate a modification to that RVO in 2017.

In three short years, the annual obligated volumes through 2022 could be close to 20 million gallons for cellulosic, 2-3 billion gallons for advanced biofuel and 14-15 billion gallons for total renewable fuel. That's a far cry from the current mandate of 36 billion gallons of renewable fuel in 2022.

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