Turner, Mason & Company
CONSULTING ENGINEERS

Focus on Fuels

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In This Issue

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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

What did He Say?

On July 28, 2017, the United States Court of Appeals for the District of Columbia Circuit (Court) reached a decision on multiple petitions related to the renewable fuels program. In the seven days since the decision, many people have opined on the significance of the decisions. I suspect most of the opinions will ultimately be proven to be incorrect or incomplete by the end of the year when the 2018 RFS standards have been set by the EPA. To properly interpret the decision, it is important to look at the original RFS program as passed by Congress and to look at the history of how we got to where we are today; however, for those set to panic (oil industry) or jump for joy (renewable fuel producers), we advise you to "wait for it." Nothing has yet been decided.

What Did He Say?

What was the Decision?

The last "Decision" that got this much attention was when LeBron James decided to leave Miami and go back home to Cleveland to bring them a championship. The gist of the 85-page renewable fuel decision is contained in the first few paragraphs. The Court was asked to consider many different issues, including whether the obligation set for 2016 was too high or too low. It was asked to consider whether the obligation should be placed on the refiner/importer or moved downstream. The Court was very clear that it rejected all of the challenges except the reason that the EPA gave for reducing the 2016 obligation from the original congressionally set obligation. (Note: We have added special emphasize by bold and underline to the quoted material.)

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 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.

"... In this set of consolidated petitions, various organizations, companies, and interest groups challenge that EPA Final Rule on a number of grounds. Some argue that EPA set the renewable fuel requirements too high. Others argue that EPA set the renewable fuel requirements too low.

We reject all of those challenges, except for one: We agree with Americans for Clean Energy and its aligned petitioners (collectively referred to as "Americans for Clean Energy") that EPA erred in how it interpreted the "inadequate domestic supply" waiver provision. We hold that the "inadequate domestic supply" provision authorizes EPA to consider *supply-side* factors affecting the volume of renewable fuel that is available to *refiners*, *blenders*, *and importers* to meet the statutory volume requirements. It does not allow EPA to consider the volume of renewable fuel that is available to ultimate *consumers* or the *demand-side* constraints that affect the consumption of renewable fuel by consumers. We therefore grant Americans for Clean Energy's petition for review of the 2015 Final Rule, vacate EPA's decision to reduce the total renewable fuel volume requirements for 2016 through use of its "inadequate domestic supply" waiver authority, ***and remand the rule to EPA for further consideration in light of our decision***. We otherwise deny the petitions for review."

The Court vacated the decision by the EPA setting the 2016 obligation (not the 2014 and 2015 obligations) and remanded the rule to EPA for further consideration in light of the Court's decision. The decision did not say that the volume set was incorrect. It only said that it was done for the wrong reason. Does the EPA have the authority to modify the obligation for any other reason? It does.

The Energy Independence and Security Act

When Congress debated and passed the Energy Independence and Security Act (EISA), it recognized that it was wading into shallow waters of understanding and preparing to thrust the country into unknown territory. As a result, the program had many provisions for on-the-fly adjustments, regular review and specific dates for program modifications. The intent of Congress seems clear that the program was meant to push the country to higher usage of renewable fuels, but not at the cost of the

general welfare of the nation.

Cellulosic Waivers

The most obvious attempt to make the program flexible was the inclusion of an option to purchase cellulosic renewable fuel credits (RINs) to satisfy a very aggressive schedule that was unlikely to be met simply because very little cellulosic renewable fuel was currently being produced, and it was almost a certainty that there would be inadequate supply. This provision could be interpreted to mean Congress expected the program to increase the use of renewable fuel, but it did not intend that the program should hamstring the American economy with unrealistic goals.

> (2) CELLULOSIC BIOFUEL
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> .-Paragraph (7) of section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)(7)) is amended by adding the following at the end thereof:
>
> "(D) CELLULOSIC BIOFUEL
>
> .-(i) **For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. *For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.***

Other Waiver Criteria

Congress included other safety valves. Inadequate domestic supply or severe harm to the economy or environment could be used as reasons to reduce the renewable fuel mandates.

> (7) Waivers
>
> (A) In general
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> 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 one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)-
>
> (i) ***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
>
> (ii) ***based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.***

What does it all Mean?

The simple take-away from reading the legislation and the recent Court decision is that there are legitimate reasons for reducing the renewable fuel volumes other than inadequate supply. Forcing ethanol content into gasoline beyond the E10 blendwall would very likely result in significant disruption in the transportation fuel market and could result in very high gasoline prices and potentially inadequate supply. The legislation clearly intended the future program administrator to consider the economic impact of the program. Also, even without the declaration of severe economic harm, the administrator is clearly given the authority to reduce the renewable fuel mandate equal to any reduction in the cellulosic obligation. The cellulosic obligation in 2016 was set at 0.23 billion gallons versus 4.25 billion gallons in the original legislation. Based on reducing the original total renewable obligation of 22.25 billion gallons by the difference in the original cellulosic obligation, less the revised obligation (4.25-0.23), the theoretical revised renewable obligation would be 18.22. The renewable fuel obligation that was set was 18.11 billion gallons for 2016, essentially the same as the calculated obligation.

It seems that the EPA must rethink the reason for the revision to the 2016 obligation and determine it was either based on the reduction in the cellulosic obligation, or it was based on economic harm. Either determination seems accurate, although the reduction in cellulosic supply seems the simplest argument.

Give us a call if you have any questions or compliance challenges in the renewable fuel program or any other fuels compliance program. We at Turner, Mason & Company keep track of all of the latest developments and we can help guide you through this and other fuels regulatory programs.