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EPA Sets Final Volumes for Renewable Fuel Standards Program for 2020, 2021, and 2022

After a two-year delay, on June 3, 2022, the U.S. Environmental Protection Agency (“EPA”) signed and submitted for publication in the Federal Register its final rule for setting renewable fuel percentage standards under the Renewable Fuel Standard (“RFS”) program.¹

This June 3, 2022 deadline was established via consent decree, under the jurisdiction of the U.S. District Court for the District of Columbia, as part of lawsuit by industry groups against EPA alleging that EPA failed to perform non-discretionary duties in accordance with the Clean Air Act (“CAA”) to establish renewable fuel standards for calendar years 2021 and 2022.²

The Final Rule modifies the 2021 and 2022 statutory volume targets for cellulosic biofuel, advanced biofuel, and total renewable fuel, as well as establishes the 2022 volume target for biomass-based diesel. The Final Rule also retroactively adjusts the previously established cellulosic biofuel, advanced biofuel, and total renewable fuel volume requirements for 2020. Additionally, EPA ultimately denied all pending petitions from small refiners for economic hardship waivers.

BACKGROUND

The RFS program, as codified in Section 211(o) of the Clean Air Act,³ was enacted to promote the production and use of clean renewable fuels and United States energy independence. Introduced in 2006 through the Energy Policy Act of 2005 (“EPAct”) and modified through the Energy Independence and Security Act of 2007 (“EISA”),⁴ the statute prescribes annual volume targets for renewable fuels through 2022 and requires EPA to translate these targets into annual compliance obligations for obligated parties or to establish alternative lesser volume and percentage requirements in accordance with EPA’s statutory waiver authority.⁵ One of the waiver provisions—which is also referred to as the “reset” rule—requires a permanent modification of the statutory volume requirements of



the RFS program if certain conditions are met.⁶ According to that rule, if EPA reduces the statutory volumes, for any fuel category, by at least 20% in two consecutive years or by at least 50% in a single year, EPA is required to modify or “reset” the statutory volume requirements. EPA’s Final Rule is issued pursuant to the “reset” rule.⁷

FINAL RULE – 2020 RENEWABLE FUEL VOLUME REQUIREMENTS

In early 2020, EPA had previously established the applicable 2020 volume requirements.⁸ However, in light of two major events—the COVID-19 pandemic and the volume of gasoline and diesel fuel exempted from 2020 RFS obligations through small refinery exemption being far lower than projected in the final rule from 2020—in the Proposed Rule, EPA proposed to retroactively reduce the 2020 volumes and standards to reflect the actual consumption of renewable fuels and transportation fuel in the U.S. in 2020.⁹

In the Final Rule, EPA adopted the 2020 volumes from the Proposed Rule. The Final Rule now retroactively cuts the (i) 2020 cellulosic biofuel volumes from 0.59 billion gallons to 0.51 billion gallons, (ii) 2020 advanced biofuel volumes from 5.09 billion gallons to 4.63 billion gallons, and (iii) 2020 total renewable fuel volumes from 20.09 billion gallons to 17.13 billion gallons. The biomass-based diesel volume remains unchanged at 2.43 billion gallons.¹⁰

FINAL RULE – 2021 RENEWABLE FUEL VOLUME REQUIREMENTS

In the Proposed Rule, EPA proposed to establish volumes that were equal to the volumes of cellulosic biofuel, advanced biofuel, and total renewable fuel that were projected to be used in the U.S. in 2021 based on data available at the time of the Proposed Rule. EPA adopted this rationale in the Final Rule, finding that this retroactive rulemaking has no ability to incentivize increased production and use of renewable fuel in 2021. Thus, EPA finalized volumes for 2021 that are equal to the actual consumption of cellulosic biofuel, advanced biofuel, and total renewable fuel in the U.S. in 2021. These volumes are as follows: (i) 0.56 billion gallons for cellulosic biofuel; (ii) 5.05 billion gallons for advanced biofuel; and (iii) 18.84 billion gallons for total renewable fuel. The biomass-based diesel volume for 2021 remains unchanged compared to 2020 at 2.43 billion gallons.¹¹

FINAL RULE – 2022 RENEWABLE FUEL VOLUME REQUIREMENTS

In the Final Rule, EPA set the following volumes for 2022: (i) 0.63 billion gallons for cellulosic biofuel; (ii) 5.63 billion gallons for advanced biofuel; (iii) 20.63 billion gallons for total renewable fuel; and (iv) 2.76 physical gallons for biomass-based diesel fuel.¹² These volume numbers for 2022 are slightly lower than what EPA had proposed in December.

Following a challenge in court of EPA’s 500-million-gallon reduction in total renewable fuel volumes for compliance year 2016,¹³ in the Final Rule, EPA set a 250-million-gallon supplemental standard for 2022 to start to restore the reduction (“2022 supplemental standard”). Going forward, EPA intends to propose an additional 250-million-gallon supplemental standard for 2023 in a subsequent rulemaking to finalize the restoration.¹⁴ EPA clarified that the 2022 supplemental standard is a supplement to the 2022 annual volume requirements, rather than a supplement to the 2016 annual volume requirements, which has passed. EPA will require obligated parties to retire available renewable identification numbers (“RINs”), meaning obligated parties will not be able to comply with their 2016 obligation using 2015 and 2016 RINs as required by existing EPA regulations. EPA further explained that by applying the supplemental standard to 2022 annual volume requirements instead of 2016 annual volume requirements, RINs generated in 2021 and 2022 will be used to comply with the 2022 supplemental standard.¹⁵

FINAL RULE – DENIAL OF SMALL REFINERY EXEMPTIONS

In the Final Rule, EPA denied all pending petitions by small refineries for economic hardship waivers. EPA stated that such petitions should only be granted based on hardship due to RFS compliance, not other factors. EPA explained that



all small refineries are able to pass costs of RFS compliance onto their customers in the form of higher sales prices on gasoline and diesel fuel, and thus waiver is not warranted.¹⁶

FINAL RULE – USE OF BIOINTERMEDIATES

As explained by EPA in the Final Rule, in order for a fuel to meet the definition of renewable fuel under the RFS program, it must be produced from renewable biomass as defined in the statute, and the RFS regulations were designed with the assumption that renewable biomass would be converted into renewable fuel at a single facility where the connection between renewable biomass and renewable fuel would be obvious and easy to verify.¹⁷ However, since 2010, companies have been asking EPA about the possible use of renewable biomass that has been substantially pre-processed at one facility to produce a proto-renewable fuel (referred to as a “biointermediate”), which would then subsequently be used at a different facility to produce renewable fuel for which RINs would be generated.¹⁸

EPA has considered this request in previous rulemakings, and in this Final Rule EPA finalized provisions to allow for the use of biointermediates to produce qualifying renewable fuels. These provisions specify requirements that apply when renewable fuel is produced through sequential operations at more than one facility. These provisions center around the production, transfer, and use of biointermediates and the creation of new regulatory requirements related to registration, recordkeeping, and reporting for facilities producing or using a biointermediate for renewable fuel production.¹⁹

NEXT STEPS

As discussed above, EPA plans to engage in a future rulemaking to establish another 250-million-gallon supplemental standard for 2023. This will round out the restoration of the 500-million-gallons that improperly reduced by EPA for compliance year 2016.

As established by the EPCA and codified in the CAA, the RFS program’s statutorily mandated volumes are scheduled to end in 2022.²⁰ EPA, however, has statutory authority to determine the annual volume requirements for 2023 and going forward.

King & Spalding has significant expertise counseling clients on all facets of EPA’s RFS program, including representing clients in enforcement investigations initiated by EPA, defending clients in enforcement actions before EPA and the Department of Justice, representing clients in litigation on challenges to EPA’s RFS program, regulatory counseling, and transactional interfaces.

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¹ RIN 2060-AV11, Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Final Rule (June 3, 2022), available at <https://www.epa.gov/system/files/documents/2022-06/rfs-2022-annual-rule-frm-2022-06-03.pdf> (herein “Final Rule”). EPA had published the proposed version of this rule on December 7, 2021. *See* RIN 2060-AV11, Renewable Fuel Standard (RFS) Program: RFS Annual Rules, Proposed Rule (December 7, 2021), available at <https://www.epa.gov/sites/default/files/2021-12/documents/rfs-2020-2021-2022-rvo-standards-nprm-2021-12-07.pdf> (herein “Proposed Rule”). For a discussion of the Proposed Rule, please see our previous alert [here](#).

² Proposed Consent Decree, Clean Air Act Citizen Suit (Feb. 23, 2022), available at <https://www.federalregister.gov/documents/2022/02/23/2022-03826/proposed-consent-decree-clean-air-act-citizen-suit>.

³ 42 U.S.C. § 7545(o).

⁴ Energy Policy Act of 2005 (P.L. 109-58); Energy Independence and Security Act of 2007 (P.L. 110-140).

⁵ 42 U.S.C. § 7545(o)(2)(B) (stating statutory volume targets), § 7545(o)(3)(B) (mandating EPA to determine the annual renewable fuel obligation), § 7545(o)(7) (providing EPA with waiver authority).

⁶ *See* 42 U.S.C. § 7545(o)(7)(F).

⁷ Final Rule at 6, 16-20.

⁸ 85 FR 7016 (February 6, 2020). EPA signed this rulemaking on December 19, 2019.

⁹ Final Rule at 7.

¹⁰ Final Rule at 5, 7, 49.

¹¹ Final Rule at 5, 8, 50.

¹² Final Rule at 55.

¹³ *Americans for Clean Energy (ACE) v. EPA*, 864 F.3d 691 (D.C. Cir. 2017).

¹⁴ Final Rule at 61.

¹⁵ Final Rule at 62-63.

¹⁶ Final Rule at 72.

¹⁷ Final Rule at 77.

¹⁸ Final Rule at 78.

¹⁹ Final Rule at 79.

²⁰ *See* 42 U.S.C. § 7545(o)(2)(B).