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Clean Air Act: Overview and Recent Developments**

by

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## The Renewable Fuels Standard Provisions Under the Clean Air Act: Overview and Recent Developments

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### Background

Pursuant to the Federal Clean Air Act (CAA) as amended by Section 1501 of the Energy Policy Act of 2005<sup>1</sup>, Congress required the Environmental Protection Agency (EPA) to promulgate regulations implementing a renewable fuels program. These regulations are commonly referred to as the Renewable Fuels Standards (RFS). The RFS outline the total volume of renewable fuel that must be blended each year as part of the domestic fuel supply. For example, in 2006, 4 billion gallons of renewable fuel were incorporated into the domestic fuel supply pursuant to the RFS mandates.<sup>2</sup>

The original RFS requirements enacted by the Energy Policy Act of 2005 included blending requirements for the fuel sector that increased over time from 4 billion gallons in 2006 to 7.5 billion gallons in 2012 – nearly doubling the requirements of 2006.<sup>3</sup> However, the Energy Independence and Security Act of 2007 (Act), signed by President Bush on December 19, 2007, increased the RFS renewable fuels mandate beginning in 2008.<sup>4</sup> Under the previous RFS requirement, blenders were obligated to incorporate 5.4 billion gallons in 2008. The new standards raised the blending obligation to 9 billion gallons for 2008 and 36 billion gallons by 2022, the final specified year of the Act.<sup>5</sup>

In the regulations implementing the renewable fuel mandates, EPA states that the purpose of RFS is to produce a reduction in some regulated pollutants, including vehicular carbon monoxide and benzene emissions, and greenhouse gas emissions.<sup>6</sup> Additionally, EPA estimated that the use of renewable fuels would increase net farm income from the use of corn, soybeans, and feedstock to produce renewable fuels.<sup>7</sup> The Agency's farm income estimates have come to fruition for corn growers and, to a lesser

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<sup>1</sup> Clean Air Act, 42 U.S.C. § 7545 (2007), amended by Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>2</sup> Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,903 (May 1, 2007) (to be codified at 40 C.F.R. pt. 80) [hereinafter *RFS Regulations*].

<sup>3</sup> *Id.*

<sup>4</sup> Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

<sup>5</sup> Revised Renewable Fuel Standard for 2008, Issued Pursuant to Section 211(o) of the Clean Air Act as amended by the Energy Independence and Security Act of 2007, 73 Fed. Reg. 8,665 (Feb. 14, 2008).

<sup>6</sup> *RFS Regulations* at 23,902 (May 1, 2007).

<sup>7</sup> *Id.*

extent, soybean producers. However, producers and agribusinesses in some states, particularly agricultural states with a greater emphasis on animal production rather than grain production, are struggling to cope with higher costs. Increases in the costs of fuel, animal feed, and groceries have driven some states to consider seeking relief from the mandates.

### **Stocks-to-Use Proposed Amendment**

Before the Energy Independence and Security Act of 2007 passed the Senate, Senator James Inhofe offered an amendment aimed at protecting against a sharp decline in the supply of corn.<sup>8</sup> The Stocks-to-Use Amendment would have compared the carryover of corn bushels from one year to the next to the total amount of corn produced. If the carryover dropped below 10 percent of total bushels used, then the RFS mandate for the year in question would be reduced by up to 15 percent.<sup>9</sup> Fortunately, for most of the history of corn production in the United States, one of the fundamental characteristics of the sector has been its ability to sustain sufficient levels of production to buffer the ebbs and flows of normal demand and supply shocks. Agricultural biotechnology research and implementation have increased the corn bushel per acre yield exponentially in the last decade. Based primarily on this characteristic of corn production history, a healthy majority of the U.S. Senate handily defeated the Stocks-to-Use Amendment.<sup>10</sup>

### **Exemptions and Waiver**

From pig producers to turkey growers, corn is the largest single cost item for animal agricultural producers. The price of corn has increased from \$2.60 per bushel in September of 2006 to over \$7.00 per bushel in July of 2008, a nearly three-fold increase in less than two years.<sup>11</sup> Although other types of ethanol are currently being researched and developed, corn-based ethanol is the most plentiful source of renewable fuel in the United States. The billions of bushels of corn being diverted for corn ethanol production to meet RFS requirements, record levels of rainfall in the mid-west which destroyed thousands of acres of planted corn; high levels of corn exports due to the weak currency status of the dollar, blenders credits and tax incentives to spur ethanol production, and import tariffs on foreign produced ethanol (particularly sugar cane ethanol produced in Brazil) have caused animal agricultural producers financial hardship.

EPA's regulations implementing the RFS provide one avenue for exemption from the standard: the small refinery exemption.<sup>12</sup> The small refinery exemption allows refineries with an average aggregate daily crude oil throughput of less than 75,000 barrels to be

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<sup>8</sup> 153 CONG. REC. 99, S7915 (daily ed. June 19, 2007) (statement of Sen. Inhofe submitting the Stocks-to-Use Amendment).

<sup>9</sup> 153 CONG. REC. 100, S8034 through S8039 (daily ed. June 20, 2007) (statements of Sen. Inhofe regarding the Stocks-to-Use Amendment).

<sup>10</sup> 153 CONG. REC. 100, S8035 through S8037 (daily ed. June 20, 2007).

<sup>11</sup> Chicago Board of Trade, <http://www.cbot.com> (last visited July 2, 2008).

<sup>12</sup> *RFS Regulations* at 23,924 (May 1, 2007).

exempt from the RFS for the first five years of the program.<sup>13</sup> Other exemptions that are typically included, the general hardship exemption and the temporary hardship exemption based on unforeseen circumstances, were proposed but not deemed necessary for this program by the EPA. As justification for deciding not to include a general hardship exemption in the RFS final rule, EPA stated:

“[g]iven the flexibility provided in the Renewable Identification Number (RIN) trading program, including the provisions for deficit carry-over, and the fact that the standard is proportional to the volume of gasoline actually produced or imported, we continue to believe a general hardship exemption is not warranted.”<sup>14</sup>

EPA also declined to adopt a temporary hardship exemption for the RFS regulations. This provision was designed to address situations in which compliance with the RFS was thwarted by natural disaster. Similar to the general hardship language, EPA relied on a volumetric argument stating, “in the event of a natural disaster, we believe it is likely that the volume of gasoline produced by an obligated party would also drop, which would result in a reduction in the renewable fuel requirement.”<sup>15</sup> Therefore, unforeseen circumstances also do not justify a party’s noncompliance with RFS.

Since there are few exemptions provided in the RFS regulations, many states are considering petitioning for a waiver or partial waiver of the standards. The Energy Policy Act of 2005 provides states the opportunity to petition EPA for waiver of the renewable fuel standards and grants authority for the consultative body, comprised of the EPA, the U.S. Department of Agriculture, and the Department of Energy, to issue relief.<sup>16</sup> To qualify for waiver, a state must demonstrate that the renewable fuel standards would severely harm the state’s economy or environment or show there is an inadequate domestic supply of renewable fuel.<sup>17</sup>

In response to public comments received during consideration of the RFS regulations, EPA acknowledged that the criteria specified to obtain relief is quite general but justified the broad language based on the uniqueness of each individual waiver request.<sup>18</sup> The Agency believes that constructing a promulgated list of criteria that would qualify a state to obtain a waiver of RFS may be counter-productive.<sup>19</sup>

In contrast to the broad and general waiver qualification language, EPA construes its authority to grant relief very narrowly. The Agency reads the Act to only permit it to

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<sup>13</sup> *Id.* (stating that the average aggregate daily crude oil throughput is determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year).

<sup>14</sup> *Id.* At 23,926 (May 1, 2007).

<sup>15</sup> *Id.*

<sup>16</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a), 119 Stat. 594 (2005).

<sup>17</sup> *Id.*

<sup>18</sup> *RFS Regulations* at 23,928 (May 1, 2007).

<sup>19</sup> *Id.* (stating “Each situation in which a waiver may be requested will be unique, and promulgating a list of more specific criteria in the abstract may be counter productive.”)

provide relief on a nationwide basis as opposed to administering relief on a case-by-case basis.<sup>20</sup> EPA's promulgated regulations state that it can reduce the national quantity of renewable fuel use required of all parties but cannot waive obligations for specific entities or locations.<sup>21</sup> The Agency believes that Congress intended to limit EPA's authority to provide relief under the state waiver provision.<sup>22</sup>

## Conclusion

In sum, the Renewable Fuel Standards, as amended by the Energy Independence and Security Act of 2007, greatly increased the blending of renewable fuels requirement. Currently, corn is the most heavily used source to produce renewable energy and is the most expensive single cost item for many animal agriculture producers. The economic impact of RFS, in addition to other factors influencing the corn market, has caused the price of corn to increase almost three-fold in less than two years. Under the RFS implementing regulations, the only option for seeking relief from the mandates is through the waiver provision. The criteria for seeking a waiver must demonstrate that the RFS is causing severe economic harm, severe environmental harm, or there is an insufficient supply of domestic renewable energy. So far, only one state has sought a waiver. Texas Governor Rick Perry filed a petition asking the Environmental Protection Agency to waive at least half of the 9 billion gallon renewable fuel blending requirement for 2008.<sup>23</sup> Over 22,000 comments were filed in response to the governor's waiver petition. EPA is currently reviewing the Texas waiver petition and comments and should respond within a 90-day window ending July 23, 2008.

## Other Resources:

Fred Sissine, CRS Report for Congress-Energy Independence and Security Act of 2007: A Summary of Major Provisions, Order Code RL34294 (Dec. 21, 2007), *available at* <http://www.nationalaglawcenter.org/assets/crs/RL34294.pdf>.

Brent D. Yacobucci & Randy Schnepf. CRS Report for Congress-Selected Issues Related to an Expansion of the Renewable Fuel Standard (RFS), Order Code RL34265 (Dec. 3, 2007), *available at* <http://www.nationalaglawcenter.org/assets/crs/RL34265.pdf>.

Brent D. Yacobucci, CRS Report for Congress-Waiver Authority Under the Renewable Fuel Standard (RFS), Order Code RS22870 (May 5, 2008), *available at* <http://www.nationalaglawcenter.org/assets/crs/RS22870.pdf>.

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<sup>20</sup> *Id.* (stating "[T]he Act does authorize EPA to waive the obligations of the program as it applies to all obligated parties, in whole or in part, depending on the severity of the situation.")

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (stating "Congress's clear intent was to limit EPA's authority to provide relief under the state waiver provision...Relief under that provision is limited to reducing the total national volume required under the RFS program.")

<sup>23</sup> Notice of Receipt of a Request From the State of Texas for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 29,753 (May 22, 2008). *See also*, Letter from Rick Perry, Governor of the State of Texas, to Stephen L. Johnson, Administrator, Environmental Protection Agency (April 25, 2008), *available at* <http://www.epa.gov/otaq/renewablefuels/rfs-texas-letter.pdf>.