EPA denies oil's request to waive cellulosic RFS, lawsuit pending

By Kris Bevill | May 30, 2012

The U.S. EPA officially denied the petroleum industry's request to retroactively waive the 2011 cellulosic biofuel volume requirements under the renewable fuel standard (RFS) on May 22, noting that the issues raised in the group's petitions had already been addressed in the EPA's proposed rule and no new evidence has since been provided by the petroleum groups to justify a rule change.

Petroleum groups have been opposed to the cellulosic biofuels portion of the RFS since it took effect in 2010. The groups contend that without a history of production, obligated parties should not be expected to include the fuels in required RFS volumes.

On Jan. 20, the American Petroleum Institute, the National Petroleum Refiners Association (now known as American Fuel and Petrochemical Manufacturers) and the Western States Petroleum Association used this reasoning in a petition filed with the EPA, asking the agency to retroactively waive its 6.6 million gallon 2011 cellulosic biofuel requirement, noting that the EPA Moderated Transaction System indicated no cellulosic biofuel renewable identification numbers (RINs) had been generated between July 1, 2010 and Oct. 1, 2011.

In the EPA's response to the petitions, however, the agency countered that its final 2011 cellulosic biofuels volume mandate was based in part on EPA assessments of every potential cellulosic biofuel producer, the results of which were made public in the proposed rule, and petitioners failed to refute the EPA's information. The agency also again stated that it does not agree with the petroleum industry's proposal to base future cellulosic standards on proven production volumes, given the current state of the emerging industry. "Basing projections only on proven production levels would be unlikely to provide the market incentives for this fuel that are needed to meet Congressional goals in establishing cellulosic biofuels as part of the RFS program," the agency said. Additionally, the agency noted that the statute clearly recognizes inherent uncertainty associated with setting forward-looking standards and provides obligated parties the option of purchasing cellulosic biofuel credits in the event of a production shortfall.

Bob Greco, API's director of downstream and industry operations, said in a statement that the credits which must be purchased by obligated parties are essentially "an added tax" on gasoline. "EPA's mandate is out of touch with reality and forces refiners to pay a penalty for not using imaginary biofuels," he said. "The fact that EPA continues to mandate these biofuels that do not exist is regulatory absurdity and bad public policy."

In March, API also filed a lawsuit in the D.C. Circuit Court to challenge the EPA's RFS volume mandate decision for 2012. In a non-binding statement of issues, the group indicated it may address possible Clean Air Act violations made by the EPA in subjecting parties to an "unrealistically high volume requirement" for cellulosic biofuels. The EPA's final 2012 RFS volume requirement reduced the cellulosic biofuels portion of the mandate from 500 million gallons to 8.65 million gallons.

In April, the court approved six biofuel trade groups, including the Renewable Fuels Association, Growth Energy, the Advanced Biofuels Association, the American Coalition for Ethanol, the Advanced Ethanol Council and the Biotechnology Industry Organization, to intervene in the lawsuit in support of the EPA.

Brent Erickson, executive vice president of BIO's industrial and environmental section, praised the EPA's denial of the petroleum group's petition in a statement released May 25, noting that the first commercial-scale cellulosic biofuels facilities are scheduled to come online this year and several more are under construction. "More than 30 companies have built and operated pilot and demonstration cellulosic biofuel biorefineries in every region of the United States to bring new technology to the
marketplace,” he said in the statement. “These companies are investing here in the United States, generating new economic growth and creating high-paying employment opportunities.”

Meanwhile, the lawsuit brought against the EPA by API is in the early stages. A briefing schedule for the case shows that API’s initial brief is due to the court June 21. Final briefs from both sides are not scheduled to be due until Oct. 9.

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