



EPA Proposes Renewable Fuel Standard Modification to Address Market Constraints, Yet Leaves Uncertainty for Future Targets

Exercising its authority under the Clean Air Act (“CAA”), the U.S. Environmental Protection Agency (“EPA”) [proposes reducing the statutory targets](#) for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuels for 2014, 2015, and 2016. The May 2015 Renewable Fuel Standard (“RFS”) proposal marks EPA’s first attempt since 2013 to address the limited capacity the nation’s gasoline fuel market may have to absorb blends of gasoline with an excess of 10 percent ethanol, known as the “blend wall.” In 2013, the agency proposed reducing the statutory targets for biofuels for 2014 by 9 percent but was met with strong resistance from the ethanol industry. In the current proposal, the 2014 RFS will be set to actual consumption. Proposed total renewable levels for 2015 and 2016 represent a 20 percent reduction of the original targets. Despite EPA’s actions, the market may still hit the blend wall in 2017 if further modifications to the RFS are not implemented.

Under the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 additions to the CAA, specific volumes of renewable fuels must be blended into transportation fuels, and EPA is required

[to translate the statutory volume targets into compliance obligations](#) for refiners and importers. The CAA requires EPA to establish these obligations no later than November 30 with respect to the following calendar year’s obligations based on Energy Information Administration (“EIA”) projections regarding renewable fuel production. If estimated renewable fuel production is less than the CAA mandated volume, EPA is empowered to adjust the obligations to match EIA projections. Furthermore, EPA may reduce the obligations under EPA’s general CAA waiver authority.

After the failure to timely establish renewable fuel volumes for 2014 and 2015, petroleum industry stakeholders [brought a lawsuit](#) against the Agency seeking an injunction requiring EPA promptly to promulgate renewable fuel obligations for 2014 and 2015. In April 2015, EPA entered a settlement under which the agency agreed to establish 2014 and 2015 obligations by November 30, 2015. EPA intends for the [current proposal](#) and final rule to meet this settlement term and for the proposal to return EPA to meeting the statutory timeline for establishing RFS volume obligations for future years.

The renewable fuel industry's reception of EPA's newest proposal has been mixed. The [National Biodiesel Board](#) labeled the proposal a "significant step in the right direction" that "will get the U.S. biodiesel industry growing again and put people back to work." Meanwhile, [industry publications](#) have contemplated the potential to challenge EPA's proposal through litigation and bemoaned the proposal as a boon to the petroleum industry.

EPA plans to enact the final rule setting the 2013, 2014, and 2015 RFS levels by November 2015. EPA's proposal includes amending certain reporting deadlines applicable to the 2013, 2014, and 2015 reporting years. Instead of submitting compliance demonstration reports for each calendar year by March 31 of the following year and associated attest engagements by June 1 of the following year, the following deadlines would apply:

- For the 2013 compliance year, compliance demonstration reports for obligated parties will be due January 31, 2016;
- For the 2014 compliance year, the deadline will be June 1, 2016; and
- For the 2015 compliance year, the deadline will be December 1, 2016.

Associated attest engagement reports will be due for obligated parties six months following the due date for the associated annual compliance demonstration report. For exporters of renewable fuel for 2013, compliance demonstration reports would be due on January 31, 2016 and attest engagement reports on June 1, 2016. For the 2014 compliance period, from January 1, 2014 through September 16, 2014, full annual compliance reports—containing an exporter's name, registration number, and exporter renewable volume obligation ("ERVO"), as well as renewable identification numbers ("RINs") retired to satisfy the ERVO and any cellulosic waiver credits used for that period—will be due January 31, 2016. The associated attest engagements will be due June 1, 2016. For exporters, there are no modifications for compliance year 2015.

While EPA is proposing modification of targets for 2014–2016 because of the blend wall, EPA believes that the fuel market is capable of overcoming the limits of the blend wall. Specifically, EPA plans evaluation of new pathways for

advanced biofuels production and amendments to accelerate growth in renewable fuel volume. Nevertheless, EPA recognizes that because the majority of renewable fuel is currently consumed as 10 percent ethanol blends, the ability of the marketplace to blend fixed volumes of renewable fuels changes in response to gasoline demand. Thus, EPA is considering alternative approaches to determining renewable fuel volume requirements for future years that would reflect gasoline demand or as a share of the transportation fuel pool. Each of these approaches could prevent the RFS standards from outpacing the ethanol blend wall.

Without concrete action, EPA's current proposal does not provide a solution to the market challenges facing continual increases to renewable fuel volume targets. First, the ethanol blend wall remains a significant hurdle despite EPA and bio-fuel industry ambitions. Second, the [Congressional Budget Office estimates](#) that the renewable fuel industry's capacity is likely to be insufficient to meet the unmodified RFS volume targets. Third, there is insufficient fueling infrastructure for fueling of flex-fuel vehicles that can run on high ethanol blends; flex-fuel vehicles represent a significant opportunity to consume renewable fuels, but without more investment in high blend fuel availability, these vehicles will continue to run on low ethanol blends. Fourth, meeting unmodified RFS requirements would likely increase the price of petroleum-based diesel by 30 cents to 51 cents per gallon, or 9 percent to 14 percent, and the price of E10, gasoline mixed with 10 percent ethanol, would increase by 13 cents to 26 cents per gallon, or 4 percent to 9 percent. In contrast, the price of high ethanol blends would decrease by 91 cents to \$1.27 per gallon, or 37 percent to 51 percent.

Comments on the proposal are being accepted through July 27, 2015. Comments may be submitted for the proposal under Docket ID No. EPA-HQ-OAR-2015-0111, at the [Federal eRulemaking Portal](#). As of mid-June 2015, more than [2,500 comments have been submitted](#). EPA intends to take final action on the RFS modification proposal by November 30, 2015, which will return the Agency to the program's statutory timeline for issuing RFS annual rules.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Thomas M. Donnelly

San Francisco

+1.415.875.5880

tmdonnelly@jonesday.com

Kevin P. Holewinski

Washington

+1.202.879.3797

kpholewinski@jonesday.com

Nancy MacKimm

Houston

+1.832.239.3776

nmackimm@jonesday.com

Charles T. Wehland

Chicago

+1.312.269.4388

ctwehland@jonesday.com

Casey F. Bradford

Atlanta

+1.404.581.8119

cbradford@jonesday.com

Jennifer M. Hayes

Pittsburgh

+1.412.394.7992

jhayes@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.