



Energy & Climate Change Team

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Renewable Fuel Standards To Be Amended

Grandfathered plants will be allowed six more months to submit engineering reviews, but critical "baseline" production volume and other certified data still required by July 1, 2010

In a little-noticed one-liner in EPA's Preamble to the Renewable Fuel Standard (RFS2) regulations (75 Fed. Reg. 14669 at 14709 (March 26, 2010)), EPA stated it would allow "grandfathered" renewable fuel facilities an additional six months beyond the July 1, 2010 facility registration deadline to submit third-party "engineering reviews" verifying the detailed information required in the registration. But nothing in the rule itself stated this.

To remedy this, on April 15, 2010, EPA posted a response to FAQs on its renewable fuels webpage stating, "EPA intends to propose changes in a direct final rule in the near future to amend the regulations to allow grandfathered facilities an additional six months from the July 1, 2010 deadline to submit their engineering review."

Grandfathered facilities, which do not have to meet EPA's established criteria for lifecycle greenhouse gas emissions, include almost all facilities that "commenced construction" before Dec. 18, 2007, and almost all ethanol plants that "commenced construction" before Dec. 31, 2009. Therefore, this extension is important to many renewable fuel producers.

The RFS2 requires submission of a third-party independent "engineering review" to confirm that the information reported to EPA during the registration process regarding fuel type and processes utilized are true and accurate. The review must include a site visit and a review of all relevant documents. EPA agreed to extend the deadline for the submission of "engineering reviews" in recognition of the fact that independent engineering expertise may be in short supply, given the six-month interval between the issuance of the final rule and the due date for registrations.

While this extension may be good news to some, grandfathered renewable fuels producers should be aware that all of the other very detailed information required to accompany the registration must be submitted by July 1, 2010, or 60 days prior to generating RINS, whichever comes later. Furthermore,

a "responsible corporate officer" must sign and certify the truth and accuracy of the registration information at the time it is submitted, and will run the risk that a subsequently submitted third-party "engineering review" will not confirm the information submitted. As demonstrated by the hundreds of questions that have been posed to EPA on-line, many new and ambiguous terms in the regulations create the possibility of inconsistent interpretation of registration requirements.

Among the required information which is still due July 1, 2010, grandfathered facilities must specify their "baseline volume" of renewable fuel production. The baseline volume stated in the July 1, 2010, registration is very important because it will define the volume of renewable fuel that is eligible for grandfathered status. Any fuel produced in excess of this baseline will not be eligible for grandfathered status in the future. See 40 C.F.R. 80.1403(c), (d), and (e).

For dry mill ethanol plants, such "excess" fuel will have to be demonstrated to have been produced at a facility that either: 1) uses at least two specified advanced technologies; 2) uses one of the specified advanced technologies, plus drying no more than 65% of the distillers grain solubles (DGS) it markets; or 3) dries no more than 50% of the DGS marketed. Most grandfathered ethanol facilities will not meet these requirements.

Note that the baseline volume is not necessarily determined by the name plate capacity, but rather is established by conditions limiting production in a facility's air pollution control permit or, if that is not available, by the facility's peak annual production over the prior five years. Given the importance of the accuracy of this baseline volume determination to future RINS eligibility, grandfathered facility owners are well-advised to carefully analyze the controlling conditions in their air permits and the language of the regulations to ensure that their baseline volume is not understated.

For more information on the RFS2 regulations or questions regarding the imminent registration process requirements, please contact:

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