

agenda for those wishing to speak at the meeting, as well as to ensure that there is adequate seating for everyone. Please note, however, that members of the public may attend without prior registration.

List of Subjects

Environmental protection, Chemicals, High production volume chemicals, Inorganic chemicals, Reporting and recordkeeping requirements, TSCA Inventory, TSCA Inventory Reset.

Dated: November 17, 2008.

Charles M. Auer,

Director, Office of Pollution Prevention and Toxics.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-8742-5]

Renewable Fuel Standard for 2009, Issued Pursuant to Section 211(o) of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 211(o) of the Clean Air Act (CAA or the Act) requires the Administrator of the Environmental Protection Agency (EPA) to annually determine a renewable fuel standard (RFS) which is applicable to refiners, importers and certain blenders of gasoline, and publish the standard in the **Federal Register**. On the basis of this standard, each obligated party determines the volume of renewable fuel that it must ensure is consumed as motor vehicle fuel. This standard is calculated as a percentage, by dividing the amount of renewable fuel that the Act requires to be used in a given year by the amount of gasoline expected to be used during that year, including certain adjustments specified by the Act. In this notice we are publishing an RFS of 10.21% for 2009. This standard is intended to lead to the use of 11.1 billion gallons of renewable fuel in 2009, as required by the Energy Independence and Security Act of 2007 (EISA). As discussed below, we expect the 11.1 billion gallons of renewable fuel required in 2009 to include approximately 0.5 billion gallons of biodiesel and renewable diesel.

FOR FURTHER INFORMATION CONTACT: Chris McKenna, Environmental Protection Agency, MC 6406J, 1200 Pennsylvania Ave., NW., Washington,

DC 20460; telephone number: 202-343-9037; fax number: 202-343-2801; e-mail address: mckenna.chris@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy Act of 2005 (EPAct) established a new section 211(o) of the Clean Air Act, creating the Renewable Fuel Standard (RFS) program. This program was implemented through rulemakings promulgated on May 1, 2007 (72 FR 23900) and October 2, 2008 (73 FR 57248). The regulatory program began on September 1, 2007.

On December 19, 2007, President Bush signed into law the Energy Independence and Security Act of 2007 (EISA), which amended Clean Air Act section 211(o) governing the RFS program. Some of the major changes enacted include:

- (1) Expansion of the applicable volumes of renewable fuel.
- (2) Separation of the renewable fuel volume requirements into four categories: cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel.
- (3) Changes to the definition of renewable fuels and criteria (e.g. life cycle greenhouse gas (GHG) emission performance) for determining which if any of the four renewable fuel categories a given renewable fuel is eligible to meet.
- (4) Expansion of the fuel pool subject to the standards to include diesel and certain nonroad fuels and expansion of the obligated parties to include refiners, certain blenders, and importers of those fuels.
- (5) Inclusion of specific types of waivers and EPA-generated credits for cellulosic biofuel.

EPA is developing a Notice of Proposed Rulemaking that will describe our proposed approach to all these changes to the RFS program (hereafter referred to as the "RFS2" program). With very few exceptions, the new EISA requirements are not effective until such time as EPA issues final regulations to implement them. Therefore, until the RFS2 rulemaking is finalized and implemented, the changes required by EISA will generally not be applicable, and the current RFS regulations (hereafter referred to as the "RFS1" regulations) will continue to apply. Therefore, for the 2009 compliance period regulated parties will continue to be subject to the existing RFS1 regulations at 40 CFR part 80, Subpart K.

Under the RFS1 program the annual standard that is applicable to obligated parties is determined by a formula

specified in the regulations. The formula uses gasoline volume projections from the Energy Information Administration (EIA) and the required volume of renewable fuel provided in Clean Air Act section 211(o)(2)(B). Since EISA modified the required volumes in this section of the Clean Air Act, the new statutory renewable fuel volume must be used under the RFS1 regulations to generate the standard for 2009. Therefore, we are using the new total renewable fuel volume of 11.1 billion gallons as the basis for the 2009 standard, and not the 6.1 billion gallons that was required by EPAct. Furthermore, the RFS program in 2009 will continue to be applicable to producers and importers of gasoline only.

While this approach ensures that the total renewable fuel volume required by EISA for 2009 will be used, the RFS1 regulatory structure does not provide a mechanism for implementing the EISA requirement for use of 0.5 billion gallons of biomass-based diesel. In our forthcoming Notice of Proposed Rulemaking for the RFS2 program, we currently intend to propose options to address this issue. The primary approach for proposal that we have identified to date would be to increase the 2010 biomass-based diesel requirement by 0.5 billion gallons and allow 2009 biodiesel and renewable diesel RINs to be used to meet this combined 2009/2010 requirement. Such an approach to biomass-based diesel would provide a similar incentive for biomass-based diesel use in 2009 as would have occurred had we been able to implement the standard for 2009. While obligated parties would not need to demonstrate compliance with the combined 2009/2010 biomass-based diesel standard until the end of the 2010 compliance period under this approach, it would behoove them to acquire the necessary RINs representing biodiesel and renewable diesel in 2009 in preparation for their 2010 compliance demonstration. As a result, we expect the 11.1 billion gallons of renewable fuel required in 2009 to include approximately 0.5 billion gallons of biodiesel and renewable diesel. Obligated parties that delayed their efforts to acquire these RINs until 2010 could find that they would be unable to acquire a sufficient number for compliance purposes.

EISA also includes a self-implementing provision regarding the life cycle GHG performance of renewable fuel that is produced after EISA enactment, but prior to EPA issuance of implementing regulations. EISA section 210(a)(1) states that, "[f]or

calendar year 2008, transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), that is produced from facilities that commence construction after the date of enactment of this Act shall be treated as renewable fuel within the meaning of section 211(o) of the Clean Air Act only if it achieves at least a 20 percent reduction in life cycle greenhouse gas emissions compared to baseline life cycle greenhouse gas emissions.” EISA further provides that for 2008 and 2009, any ethanol plant that is fired with natural gas, biomass or any combination thereof is deemed to be in compliance with the 20 percent life cycle GHG reduction requirement. Based on the text of this section, which is not an amendment to section 211(o) of the CAA and is not covered by the rulemaking provision in EISA section 202(a)(1) (amending section 211(o)(2)(A)(i)), EPA stated in the context of its Notice of the 2008 RFS that these requirements are self-implementing, and therefore effective prior to issuance of the RFS2 regulations. The statute clearly provides

that “in 2008” fuel from a facility that commenced construction after enactment of EISA, and which is not fired with natural gas, biomass or a combination thereof, must meet the 20% GHG reduction requirement, even in the absence of a final RFS2 rulemaking. The statute is less clear regarding the situation in 2009, prior to EPA issuance of final RFS2 rules. EPA is not interpreting this provision at this time, because EPA believes there will be no fuel sold in 2009 from a facility that was constructed after EISA enactment, and which is not fired with natural gas, biomass or a combination thereof. If EPA learns of such fuel being sold, we will interpret the above-referenced statutory provisions at that time.

II. Calculation of the 2009 RFS

A. Formula

In today’s notice we are using the calculational procedure set forth in the final rulemaking for the Renewable Fuel Standard Program at 40 CFR part 80 Section 1105. The formula includes a variable representing the volume of renewable fuel required by CAA section

211(o), and EPA is today using that formula with the renewable fuel volume for 2009 required by the EISA amendments to CAA section 211(o) to calculate the RFS for 2009. Since the RFS1 rule established clear legal criteria for deriving the standard (including specification of the formula used in today’s notice, and all data sources), EPA is simply applying facts to pre-established law in issuing the 2009 RFS. EPA is advising the regulated community of the standard through this **Federal Register** Notice, without prior notice and comment, in accordance with the Clean Air Act and EPA regulations.

The 2009 RFS is calculated by dividing the volume of renewable fuel required by CAA section 211(o) to be blended into gasoline in 2009, by the volume of gasoline projected by the Energy Information Administration (EIA) to be consumed in 2009 (including certain adjustments specified by the Act). The following equation from the final RFS1 regulations summarizes all of the variables that must be considered in the calculation.

$$RFS_{std}_i = 100 \times \frac{RFV_i - Cell_i}{(G_i - R_i) + (GS_i - RS_i) - GE_i}$$

Where:

- RFS_{std}_i = Renewable Fuel Standard in year i , in percent
 RFV_i = Annual volume of renewable fuels required by section 211(o)(2)(B) of the Act for year i , in gallons
 G_i = Amount of gasoline projected to be used in the 48 contiguous states, in year i , in gallons
 R_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in the 48 contiguous states, in year i , in gallons
 GS_i = Amount of gasoline projected to be used in Alaska, Hawaii, or a U.S. territory in year i if the state or territory opts-in, in gallons
 RS_i = Amount of renewable fuel blended into gasoline that is projected to be consumed in Alaska, Hawaii, or a U.S. territory in year i if the state or territory opts-in, in gallons
 GE_i = Amount of gasoline projected to be produced by exempt small refineries and small refiners in year i , in gallons (through 2010 only unless exemption extended under §§ 211(o)(9)(A)(ii) or (B))
 $Cell_i$ = Beginning in 2013, the amount of renewable fuel that is required to come from cellulosic sources, in year i , in gallons (250,000,000 gallons minimum)

B. Data Sources for 2009 RFS Calculation

The following discussion describes the sources of data for the variables in

the above equation. For ease of calculation, this discussion regroups the terms $(G_i - R_i) + (GS_i - RS_i)$ in the denominator of the above equation into the terms $(G_i + GS_i) - (R_i + RS_i)$.

Calculation of $(RFV_i - Cell_i)$, Total Amount of Renewable Fuels From Non-Cellulosic Sources That Must Be Blended Into Gasoline in 2009

The EISA amended CAA section 211(o) to require 11.1 billion gallons of renewable fuels to be blended into gasoline in 2009. The amount of renewable fuel required to be produced from cellulosic sources in 2009 ($Cell_i$) is zero. Thus the total amount of renewable fuels that must be blended into gasoline in 2009 is 11.1 billion gallons.

Calculation of $(G_i + GS_i)$, Total Amount of Gasoline Projected To Be Used in the 48 Contiguous States Plus Opt-In States/Territories, in Year i , in Gallons

CAA section 211(o) requires the Administrator of the EIA by October 31 of each year to provide EPA with an estimate of the volumes of gasoline projected to be sold or introduced into commerce in the United States for the following year. During the development of the RFS1 Program, EIA informed EPA

that the projected gasoline consumption in “Table 4a: U.S. Petroleum Supply, Consumption, and Inventories” (formerly “Table 5a. U.S. Petroleum Supply and Demand: Base Case”) of the October issue of the monthly *Short-Term Energy Outlook* (STEO) should be used to calculate the RFS for the coming year. The October 2008 STEO projects that an average of 9.05 million barrels/day (or 380.1 million gallons/day) of gasoline will be consumed in all of the United States in 2009. Multiplying this average consumption rate by 365 days produces a total consumption of 138.74 billion gallons of gasoline in 2009.

Only one non-contiguous state or territory has petitioned EPA to opt into the RFS Program beginning in 2008. Hawaii petitioned EPA on June 22, 2007, to opt into the RFS program, and EPA approved their request.¹ Thus, Alaska is the only one of the 50 states that is not included in the RFS Program.

In order to calculate gasoline consumption in the 48 contiguous states plus Hawaii, we subtracted Alaska’s projected gasoline consumption from the projected nationwide gasoline

¹ Letter to the Honorable Linda Lingle, Governor of Hawaii, from Stephen Johnson of EPA dated July 30, 2007.

consumption of 138.74 billion gallons. Alaska's projected gasoline consumption was calculated by multiplying the projected nationwide gasoline consumption in 2009 by the ratio of Alaska's gasoline consumption in 2007 to the total U.S. consumption in 2007, based on Table 45, "Prime Supplier Sales Volumes of Motor Gasoline by Grade Formulation, PAD District, and State" gasoline data from EIA's *Petroleum Marketing Annual 2007* (the final rulemaking used data from *Petroleum Marketing Annual 2005*). According to EIA, Prime Supplier data reflects where gasoline is used, rather than where it is produced.² Alaska's projected gasoline consumption in 2009 is 0.27 billion gallons. Subtracting this consumption from the projected nationwide consumption of 138.74 billion gallons in 2009 produces a total consumption of 138.47 billion gallons of gasoline in 2009 in the 48 contiguous states plus Hawaii.

Calculation of $(R_i + RS_i)$, Total Amount of Renewable Fuel Blended Into Gasoline That Is Projected To Be Consumed in the 48 Contiguous States Plus Opt-In States/Territories, in Year i , in Gallons

The projected gasoline consumption in the October 2008 STEO includes

renewable fuel that is blended into gasoline. This volume of renewable fuel must be subtracted from the total volume of gasoline in order to calculate the total consumption of non-renewable gasoline. In Table 8 of the October 2008 STEO, EIA estimates that 0.929 quadrillion Btu of ethanol will be used as transportation fuel in all of the United States in 2009. Dividing this energy usage by the high heating value of ethanol (3.539 million Btu/barrel), and multiplying by 42 gallons/barrel produces a total projected ethanol usage of 11.03 billion gallons nationwide in 2009.

Since Hawaii has opted in, but Alaska has not opted in, to the RFS program for 2009, Alaska's renewable fuels consumption must be subtracted from the nationwide renewable fuels consumption to calculate renewable consumption in the 48 contiguous states plus Hawaii. In Chapter 2 of the Regulatory Impact Analysis for the RFS1 program rulemaking, EPA estimated that ethanol consumption in Alaska would be negligible prior to 2012.³ Thus, calculated projected renewable fuels consumption in the 48 contiguous states plus Hawaii is 11.03 billion gallons in 2009, slightly lower than the RFS for 2009.

Calculation of GE_i , Amount of Gasoline Projected To Be Produced by Exempt Small Refineries and Small Refiners in Year i , in Gallons⁴

In the final rulemaking establishing the RFS1 program regulations, we stated that we would estimate the combined small refinery and small refiner gasoline volume using a constant percentage of national consumption. Using information from gasoline batch reports submitted to EPA, EIA data and input from the California Air Resources Board regarding California small refiners, we estimated this percentage to be 13.5%.⁵

Multiplying the projected nationwide consumption of gasoline in 2009 (138.74 billion gallons) by 13.5% results in a total projected production of 18.73 billion gallons of gasoline from small refiners and small refineries in 2009.

Calculation of $RFStd_i$, Renewable Fuel Standard in Year i , in Percent

Substituting all of the terms calculated above into the equation for $RFStd_i$ results in the following RFS for 2009,

$$RFStd_i = 100 \times \frac{11.1}{138.47 - 11.03 - 18.73} = 10.21\%$$

Therefore, the RFS for 2009 is 10.21%. This is the standard referenced in 40 CFR 80.1105(b) through (d) and which obligated parties apply to determine their renewable volume obligation under 40 CFR 80.1107.

Dated: November 14, 2008.

Robert J. Meyers,

Principal Deputy Assistant Administrator,
Office of Air and Radiation.

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FEDERAL TRADE COMMISSION

Public Hearings Concerning the Evolving Intellectual Property Marketplace

AGENCY: Federal Trade Commission.

² Energy Information Administration, *Petroleum Marketing Annual 2007*, Explanatory Notes, Relationship of Refiner and Prime Supplier Sales Volumes" (p. 393).

³ Table 2.2-21 "2012 Forecasted Ethanol Consumption by State," Regulatory Impact

ACTION: Notice of Public Hearings

SUMMARY: The Federal Trade Commission will hold a series of public hearings beginning on December 5, 2008, in Washington, D.C., to explore the evolving market for intellectual property (IP). The hearings will examine changes in intellectual property law, patent-related business models, and new learning regarding the operation of the IP marketplace since the FTC issued its October 2003 report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (the FTC IP Report).¹ Changes and proposed changes in the law, together with evolving business models for buying, selling and licensing IP, could significantly influence a patent's economic value and the operation of the IP marketplace. The hearings will

Analysis: Renewable Fuel Standard Program, April 2007.

⁴ Through 2010 only, unless the exemption is extended under 211(o)(9)(A)(ii) or (B) of the Act.

⁵ "Calculation of the Small Refiner/Small Refinery Fraction for the Renewable Fuel Program,"

consider the impact of these changes on innovation, competition and consumer welfare.

The Commission seeks the views of the legal, academic, and business communities on the issues to be explored at the hearings. This notice poses a series of questions relevant to those issues on which the Commission seeks comment. Each hearing will be transcribed. The transcript and any written comments received will be placed on the public record.

DATES: The first hearing will be held December 5, 2008, in the Conference Center of the FTC office building at 601 New Jersey Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. An agenda for that hearing will be posted on the FTC's website, www.ftc.gov. The Commission may hold

memo to the docket from Christine Brunner, ASD, OTAQ, EPA, September 2006.

¹ **Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy** (October 2003), available at (<http://www.ftc.gov/os/2003/10/innovationrpt.pdf>) ("IP Report").