

EPA's renewable fuel standard for 2009/2010 biodiesel blending upheld

McAfee & Taft RegLINC - January 2011

By [Heidi Slinkard Brasher](#)

On December 21, 2010, the U.S. Court of Appeals for the D.C. Circuit upheld the lower court's decision and handed a win to the Environmental Protection Agency (EPA) in actions brought by the National Petrochemical & Refiners Association (NPRO) and the American Petroleum Institute (API) (Nat'l Petrochemical & Refiners Ass'n v. EPA, D.C. Cir., No. 10-1070, consolidated with No. 10-1071).



Congress' 2007 Energy Independence and Security Act (EISA) expanded the renewable fuel provisions of the Energy Policy Act of 2005 by increasing the renewable fuel volume requirement for U.S.-sold gasoline and added volume requirements for advanced biofuels, biomass-based diesel and cellulosic biofuel. As a result of these changes, the EPA revised its 2005 Act regulations.

According to the EPA, the new EISA directives led to the EPA's inability to meet the deadline for establishing 2009 volume requirements. Instead, the EPA set a combined 2009/2010 biomass-based diesel standard in its final revised regulation on February 3, 2010, which was posted on its website that day and published as a Final Rule in the March 26, 2010, Federal Register. In the Final Rule, obligated parties — refiners, importers and some gasoline blenders — must demonstrate compliance with the 2010 standard by February 28, 2011. Upon publication of the Final Rule, the NPRO and API brought suit, challenging it as violating statutory requirements to set separate 2009 and 2010 volume requirements, as impermissibly retroactive, and as violating statutory compliance provisions and lead times.

In upholding the Final Rule, the Court held that the EPA's missed deadline for setting the standards did not result in a loss of its authority to act and that such loss of authority would only result had Congress provided for the same in the EISA. The NPRO and API argued that the imposition of the standard which became effective in July 2010, but which applied to all of 2010, resulted in an "impermissibly retroactive" Final Rule. However, the Court held that Congress provided the EPA authority under the EISA to act and, "[t]o the extent the Final Rule may be retroactive[], the agency] did not exceed its authority." The court arrived at this conclusion after review of the statutory and agency history and review of other legal precedent, noting:

- There is a difference between invalid "new sanctions on past conduct" and a rule that "merely 'upsets expectations,' which is secondarily retroactive."

McAfee & Taft
RegLINC
JANUARY 2011

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REGULATORY

NEW YEAR OF GHG REGULATION

BY AMY FLETCHER

EPA's Clean Air Act rules regulating GHG emissions were challenged by the National Petrochemical & Refiners Association (NPRO) and the American Petroleum Institute (API) in a lawsuit filed in the D.C. Circuit Court of Appeals in December 2010. The court's decision in *Nat'l Petrochemical & Refiners Ass'n v. EPA*, No. 10-1070, consolidated with No. 10-1071, is a significant win for EPA. The court held that EPA's authority to regulate GHG emissions under the Clean Air Act is not limited to the regulation of air quality, but extends to the regulation of climate change. The court also held that EPA's authority to regulate GHG emissions under the Clean Air Act is not limited to the regulation of air quality, but extends to the regulation of climate change. The court also held that EPA's authority to regulate GHG emissions under the Clean Air Act is not limited to the regulation of air quality, but extends to the regulation of climate change.

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- Any primary retroactive effects were implicitly authorized under the EISA and the EPA reasonably balanced any retroactive effects against the benefits of applying “the new regulations to the full calendar year.”
- “EPA had clear albeit implicit authority under the EISA to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve the statutory purpose” — “Congress anticipated the possibility of some retroactive aspects in the first year of the expanded renewable fuel program” and was “explicitly aware” the EPA may miss a deadline for promulgation.
- The effect of any retroactivity did not make “the situation worse” because of the ample notice the obligated parties had regarding their need to accumulate RINs to meet the 2010 obligations.
- Adequate lead time and notice of obligations were given.

LINKS

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