Fuels Alert

I. EPA to Promulgate 2014 and 2015 Renewable Fuel Standards Under Proposed Settlement with Petroleum Industry

The U.S. Environmental Protection Agency (“EPA” or “Agency”) announced a proposed consent decree to settle claims, brought by trade associations for the petroleum industry, that the Agency violated the Clean Air Act by failing to promulgate timely renewable fuel volume obligations for compliance years 2014 and 2015.¹ Under the Act, the Agency is required to promulgate the renewable fuel requirements by November 30th of the year preceding their applicability.² The Agency has repeatedly missed this deadline, and its persistent delays continue to contribute to significant market uncertainty.

Under the proposed consent decree lodged with the court on April 10, 2015, EPA would have to meet the following deadlines:

- Sign a notice of proposed rulemaking to establish the 2015 renewable fuel volume obligations by June 1, 2015;
- Sign a final rule promulgating the 2014³ and 2015 renewable fuel volume obligations by November 30, 2015; and

In the recitals preceding the substantive provisions of the proposed consent decree, EPA also states its intention to issue proposed and final rules for the 2016 renewable fuel volume obligations on the same timeline as the 2015 requirements. While EPA is not bound by the recitals, this comports with the timeline set by the Clean Air Act.

The Agency has obtained the plaintiffs’ signatures on the proposed consent decree, but in conformance with the Act’s procedures, is waiting to sign the proposal until after it has been announced in the Federal Register and EPA has reviewed any comments submitted by the public. If none of the comments oppose the settlement agreement, then EPA will sign the proposal and ask the court enter the decree.

II. Gasoline Sulfur and Benzene Credit Programs Move to EMTS

To streamline credit tracking and compliance, EPA is transferring the Gasoline Sulfur and Benzene Averaging, Banking, and Trading (“ABT”) Credit Program under 40 C.F.R. Part 80, Subparts L and O, to the electronic program currently used for renewable fuel transactions, known as the EPA Moderated Transaction System (“EMTS”). According to an announcement made by EPA on April 8, 2015 through its EnviroFlash electronic messaging service, gasoline refiners and importers with unused ABT credits from 2010-2014 will have until April 30, 2015 to upload these credits into EMTS in order to carry them forward. Beginning May 1, 2015, all ABT credits must be transferred through EMTS.

To upload credits into EMTS, a company’s responsible corporate officer (“RCO”) must first register with EPA’s Central Data Exchange (“CDX”) Office of Transportation and Air Quality Registration system (“OTAQREG”). A company that generates or trades renewable fuel identification numbers (“RINs”) should already have a registered RCO with electronic signature capabilities. If not, then a paper registration form must be signed and mailed to EPA and processed by the Agency. The processing time can take a number of days, so the form should be submitted a couple of weeks in advance of the April 30, 2015 deadline. The registered RCO must then assign a company employee the new role in OTAQREG for “Fuels ABT EMTS Submitter.” The Fuels ABT EMTS Submitter will then be able to upload existing ABT credits into EMTS and make future trades. For assistance with the registration and EMTS credit uploading process, companies can refer to EPA’s “Guidance for the Transition of Sulfur and Benzene Credit Programs to an Electronic System” (April 2015). The Agency provided additional background information at http://www.epa.gov/otaq/fuels/gasolinefuels/sul-ben.htm.

EMTS is designed to include data quality checks and generate summaries to facilitate compliance. For example, the number of times an individual credit can be traded will be limited to two and ABT credits can only be traded to gasoline refiners and importers, in conformance with the ABT regulatory requirements. The summaries generated by EMTS will also assist companies with annual reporting obligations.

While EMTS is intended to simplify credit tracking and compliance, companies should beware of a few issues that can arise when using this program. First, a company should make sure that its credit balance in EMTS is accurate and up to date as of April 30, 2015. If, prior to May 1, 2015, a company uploaded credits into EMTS and subsequently made a trade under the old system, it should enter the trade into EMTS by April 30, 2015 to ensure its credit balance is up to date. Second, an organization must adjust its credit balance in the event of either an over-generation or under-generation of credits. Currently, this can only be done through a remedial action process that, depending on the facts of the situation, can require contacting the Agency rather than independent correction through EMTS. It may be prudent to seek counsel prior to contacting EPA in order to explore self-disclosure options under EPA’s “Audit Policy.” Finally, EPA has changed certain features of the ABT Credit Program. Upon transition to EMTS, all credits will be owned and managed at the company level, rather than at the facility level. As a
result, facility reports, such as the “Facility Gasoline Sulfur Credit Transfer/Conversion Report” (GSF0200), will no longer be required. In addition, the “MSAT-2 Credit Transfer Report” (RFG2200) will no longer be required under the benzene program.

To discuss these actions or any other aspect of EPA’s fuels regulations, please contact Jean-Cyril (JC) Walker (walker@khlaw.com, (202) 434-4181) or Adrienne M. Timmel (timmel@khlaw.com, (202) 434-4164).