

Document Review in the Face of Plant Optimization Activities

By John Eustermann

Owners of existing biofuel refining facilities are always looking to maximize yields. In the face of the current economic environment however, the focus on plant optimization has become even more important. Whether optimization modifications involve energy optimization packages, ammonia/enzyme upgrades, gas separation, oil extraction or corn/biomass fractionation in the case of ethanol refineries, or cavitation or catalyst/resin enhancements in the case of biodiesel refineries, it is wise to consider the impact such activities have on previously-executed financing and operational documents.

The following is a list of some common facility-related documents that should be examined when considering technological modifications to, or optimization of a facility:

- **Financing Documents:** Although existing plant lenders and capital providers generally encourage optimizing activities that result in cost benefits and improved margins, consideration of such activities should include a review of the financing documents and a dialogue with the company's lenders and capital funding sources. An examination of all financial and operational lender covenants is key, as a number of provisions might be triggered by proposed investments in optimizing a facility. For companies still subject to construction, term and/or working capital loans for example, there are likely a number of restrictions that require lender consent to any significant changes to the plant. Further, given the current turmoil in the world financial markets, prior to approving new capital investment, lenders and other stakeholders will want to review all background materials and information about the proposed project, including revenue enhancing and payback projections to ensure such figures are based on sound and reasonable assumptions.

- **Technology Licenses:** As part of the initial construction and development of a biofuel facility, a technology license agreement is often a key document included in the overall construction or document package. Such technology licenses generally include language governing the scope of use of the initial process technology and may include specific language regarding each party's rights, duties and obligations related to subsequent technological modifications to the initial licensed process. Certain provisions not only create issues for the licensee, but may also create issues

for any third party whose optimization technology is being considered for installation. Thus, a close examination of the terms and conditions of the applicable technology license agreement and the respective parties' intellectual property rights is warranted in the face of optimization strategies that involve technological modifications.

- **Off-take Agreements:** As the primary documents governing the generation of revenue for the biofuel refinery, a good review of such off-take agreements in the face of any plant optimization activities cannot be over-emphasized. The issues to consider range from the potential for any production slowdown that may be caused by any plant upgrade, to the effect such technology changes may have on the quality of the fuel produced. A failure to meet production quantity or product quality specifications can negatively affect cash flow and may result in a breach of the agreement itself. Thus, to the extent that certain optimization activities may influence product production, management is wise to proactively address the issues and work with the respective off-taker to mitigate any negative effects.

- **Permits and Site Control Issues:** The effect that any proposed optimization project may have on a facility's environmental controls cannot be overlooked. When considering plant modifications, much like when initially developing the facility, permitting should be a primary consideration. With regard to both air and water, plant upgrades and optimization activities can trigger a need to obtain new or revised permits. Regulatory review is often required when physical changes to the facility or changes in the method of the facility's operation may result in increased or modified air emissions or changes to water appropriation and/or water discharges at the plant. Such regulatory reviews will determine if additional permitting is required for operational compliance of the facility in its optimized state. Even if the resulting increased air emissions or changes to water appropriation and/or water discharges will meet existing permit limits, such regulatory review is likely required.

John Eustermann is an attorney with Stoel Rives LLC. Reach him at jmeustermann@stoel.com or (208) 387-4218.



Eustermann

The claims and statements made in this article belong exclusively to the author(s) and do not necessarily reflect the views of *Bioenergy Canada* or its advertisers. All questions pertaining to this article should be directed to the author(s).