

Three Little Words: EPA and the RFS Waiver Authority

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The Environmental Protection Agency's (EPA) long process to set the volume requirements for calendar years 2014, 2015, and 2016 under the Renewable Fuel Standard (RFS) was completed with the recently published final rule. The final RFS rule reduces the volume requirements for renewable fuels from the statutorily-mandated levels. EPA argues that it has the authority to reduce the mandate based on a specific waiver provision in the statute and its interpretation of the three words 'inadequate domestic supply' in that provision. Whether the rule and EPA's arguments for the waiver authority will withstand a court challenge is an open question.

Legal Background

Renewable transportation fuels such as ethanol have a fairly long history but much of the emphasis began during the energy crises from the 1970's when the Organization of the Petroleum Exporting Countries (OPEC) cut supplies, forced rationing and caused gas prices to spike (McCarl and Boadu, 2009). Initially, ethanol was an additive to help boost oxygen in gasoline, but the oil industry turned to methyl tertiary butyl ether (MTBE) in the 1990's. MTBE, however, was banned by many states and phased out by industry because it is a carcinogen and was found to be leaching into drinking water (McCarl and Boadu, 2009). The 2005 energy bill "marked an important transition in U.S. energy policy" because it created the Renewable Fuels Standard (RFS) (McCarl and Boadu, 2009). The RFS mandated that 4.0 billion gallons of renewable fuel be blended into the domestic fuel market in 2006 and increase to 7.5 billion gallons by 2012. The RFS included a general waiver provision that provided waiver authority if the Administrator determined that either: (1) "implementation of the requirement would severely harm the economy or environment of a state, a region, or the United States;" or (2) "there is an inadequate domestic supply" (Clean Air Act, 2011). In 2007, Congress passed the Energy Independence and Security Act of 2007 (EISA) which substantially increased the RFS to 36 billion gallons by 2022 and is generally referred to as RFS2. EISA amended the waiver provisions but only as it applied to cellulosic ethanol, which had been added by RFS2.

In the final RFS Rule, EPA states that "the volumes for advanced biofuel and total renewable fuel specified in the statute cannot be achieved in 2014, 2015, or 2016" and that it is

"exercising our discretion . . . to reduce the applicable volumes of advanced biofuel and total renewable fuel . . . to address constraints on the supply of renewable fuels in the future that are driven by both limitations in production or importation of these fuels and factors that limit supplying them to vehicles that can consume them (EPA, 2015, at 29)."

The final phrase is the focus of significant controversy with the rule because EPA uses it to justify an additional reduction beyond the cellulosic-based reduction; the additional reduction impacts conventional biofuels such as ethanol and biodiesel (EPA, 2015, at 45). EPA interprets the phrase "inadequate domestic supply" in the statute to "encompass the full range of constraints that could result in an inadequate domestic supply of renewable fuel to the ultimate consumers, including fuel infrastructure and other constraints" (EPA, 2015, at 37). EPA is therefore using what is known as the "blend wall" to reduce the RFS mandates. The blend wall is a physical limit on the amount of ethanol that can be consumed in the transportation fuel system given that the vast majority of vehicles

and gasoline are approved for 10% ethanol (E10), as opposed to higher blends such as E85 that is 85% ethanol (Schnepf and Yacobucci, 2013).

Three Questions of Interpretation

Evaluating EPA's final RFS rule involves matters of constitutional law and looks to U.S. Supreme Court precedent for guidance. There are three critical questions about EPA's interpretation of the general waiver authority. First, is a question of deference and whether Congress properly delegated authority. Second, is a question about the meaning of the word "supply" in the RFS statute, which involves how to interpret the statute's words. Third, is a question about the reasonableness of EPA's interpretation within the intent of Congress for the RFS2.

A Question of Deference and Delegation

At its core, this is a constitutional question. The Constitution provides for the separation of powers among the branches—Legislative, Executive and Judicial—in the American system of government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." The fundamental question is whether Congress can delegate its exclusive role under the Constitution to executive branch agencies and how much delegation is permissible. Congress writes the laws, executive branch agencies execute and implement the laws. Rulemaking, however, involves some aspects of policymaking such as interpreting the words and intent of Congress (U.S. Supreme Court, 1984). An agency's authority is limited to "a contextual commitment of authority" when Congress was clear in the statute (U.S. Supreme Court, 2001, at 468).

Given the delicate Constitutional balancing act involved, courts will not easily conclude that Congress delegated authority to "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" (U.S. Supreme Court, 2001, at 468). According to the Supreme Court, review of "an agency's construction of the statute which it administers" begins with: (1) "whether Congress has directly spoken to the precise question at issue"; or (2) if "Congress has not directly addressed the precise question at issue . . . if the statute is silent or ambiguous with respect to the specific issue" (U.S. Supreme Court, 1984, at 842-43). If Congress has directly spoken and its intent is clear, then the agency must adhere to the "unambiguously expressed intent of Congress" (U.S. Supreme Court, 1984, 842-43).

Under the RFS statute, Congress clearly provided that for calendar years 2014, 2015, and 2016, the "applicable volume of renewable fuel" is to be 18.15 billion gallons, 20.5 billion gallons and 22.25 billion gallons, respectively (Clean Air Act, 2011). The statute also explicitly provided waiver authority to EPA that could be used to decrease the statutory mandated levels, including if "there is an inadequate domestic supply" (Clean Air Act, 2011). This appears to be a clear Congressional delegation to EPA to revise the RFS volumes and this article presumes it to be legitimate. The authority, however, is limited to instances where EPA has determined that there is an inadequate domestic supply. This raises the question of whether EPA is making a permissible interpretation of that phrase.

A Question of the Meaning of the Word 'Supply' in the Statute

The second question comes down to the meaning of the word supply, or what Congress intended the word to mean in the statute. If Congress was clear, EPA has no choice but to adhere to that meaning; if Congress was "ambiguous" then EPA generally is able to interpret the word so long as the interpretation is reasonable (U.S. Supreme Court, 1984). Congressional ambiguity also means that a court's review must give "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer" (U.S. Supreme Court, 1984, at 843-44).

EPA argues that the phrase is ambiguous because Congress did "not specify what the general term 'supply' refers to" (EPA, 2015, at 37). EPA concludes that the "common understanding" of the term supply is "an amount of a resource or product that is available for use by the person or place at issue" and that for renewable transportation fuel this would be "in terms of the person or place using the product", that is, the ultimate consumer purchasing fuel (EPA, 2015, at 37). Ambiguity does not, however, provide complete delegation and deference to the agency. The Supreme Court has recently reiterated that statutory interpretation of specific words cannot be done in isolation, but rather words must be "placed in context" in order to produce "a substantive effect that is compatible with the rest of the law" (U.S. Supreme Court, 2015a, at 2489-92.).

EPA's interpretation of the waiver authority is controversial because it includes matters beyond basic supplies of

renewable fuel and looks to whether the renewable fuel can be available for consumption by the ultimate consumer. To make this interpretation, EPA relies on the definition for renewable fuel in the statute, which defines renewable fuel in terms of replacing or reducing fossil fuels in the transportation sector. EPA argues that this definition means that “there is no ‘renewable fuel’ and the RFS program does not achieve the desired benefits of the program unless biofuels like ethanol and biodiesel are actually used to replace fossil-based transportation fuels” (EPA 2015, at 37). The RFS statute, however, makes no explicit mention of the ultimate consumer. It applies to “transportation fuel sold or introduced into commerce” in the United States; EPA’s regulations are to ensure that U.S. transportation fuel contains at least the mandated volumes of renewable fuel (Clean Air Act, 2011). There is no linkage to the ultimate consumer and there is no requirement that consumers purchase the renewable fuel or the transportation fuel that contains it. This calls into question EPA’s interpretation.

EPA defines the word supply in terms of renewable fuel being available for use by a person at issue. EPA argues that Congress did not specify the person at issue. The statute raises doubt about this conclusion. Congress explicitly stated that all regulations promulgated for the RFS program “shall contain compliance provisions applicable to refineries, blenders, distributors, and importers” (Clean Air Act, 2011). This may well answer the question EPA raises and clear up any ambiguity because it indicates that the persons at issue for the mandate and waiver are what are known as the obligated parties—refineries, blenders, distributors and importers—not consumers. If so, this interpretation would mean that the phrase ‘inadequate domestic supply’ applies to renewable fuel supplies to these parties and not to renewable fuel purchased, available for purchase or consumed by drivers.

Such an interpretation arguably also makes common sense under the statutory scheme. The RFS was intended to increase renewable fuels production and supply, but the ultimate consumer does not directly purchase renewable fuel and is not subject to the mandate. In fact, most consumers have minimal control over transportation fuels, and even less when it comes to how much renewable fuel is blended into what is sold at the pump. Currently, most of the ultimate consumers in this country can purchase only E10 unless they own an E85 vehicle and are at a station that sells E85—hence the blend wall (Babcock and Pouliot, 2013). The only parties purchasing renewable fuel that have to be concerned about its supply are the blenders; the ultimate consumer merely consumes that which is provided for purchase. This would be the most natural reading of the statute and EPA’s extensive discussion regarding how the existing fuel infrastructure and even the regulatory system continue to perpetuate a bottleneck in getting the renewable fuels to the ultimate consumer indicates as much. EPA does not argue that the renewable fuels industry is unable to produce enough to supply the obligated parties under the mandate, with the exception of cellulosic. EPA’s definition of supply and its interpretation of the waiver authority thus raise the third question: whether it is a reasonable interpretation.

A Question of Reasonableness within the Statutory Scheme

EPA must make a “permissible construction of the statute” that is reasonable, meaning that “an agency’s interpretation of a statute is not entitled deference when it goes beyond the meaning that the statute can bear” (U.S. Supreme Court, 1984, at 843-44; U.S. Supreme Court, 1994, at 229). An agency “may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law” (U.S. Supreme Court, 2000, at 125; Coppers, 2015a). Moreover, “Federal administrative agencies are required to engage in reasoned decision making” that produces an end result “within the scope of its lawful authority” (U.S. Supreme Court, 2015b, at 2706; Coppers, 2015b). Congress provided what may be conflicting authorities to EPA: specific mandated levels of renewable fuels and authority to waive the mandates. The key is that the waiver authority was provided only for limited circumstances. Sorting this out likely involves guidance about Congressional intent that can be gleaned from the legislative history and similar provisions elsewhere in the Clean Air Act, as well as a general analysis of the goals for the RFS and the clear intent of Congress.

The waiver’s legislative history provides clues, but it is not dispositive. As initially written by the U.S. House of Representatives, the RFS waiver applied when the Administrator determined that “there is an inadequate domestic supply or distribution capacity to meet the requirement” (U.S. Congress, 2005). The Senate, however, wrote and passed a slightly modified version of the waiver provision that permitted waiver upon a finding “that there is an inadequate domestic supply”—notably leaving out distribution capacity (U.S. Congress, 2005). The final conference agreement between the two contained the waiver authority as written by the Senate and did not include distribution capacity. While not definitive, the legislative history does indicate that the House of

Representatives and Senate wrote different versions of the waiver provision and that when they resolved those differences in the conference committee the Senate version prevailed. It also lends support to the ethanol industry's argument that Congress intentionally removed the phrase so that it would not be a consideration in the waiver decision (Rascoe, 2014).

The larger statutory context can also be instructive but the Supreme Court has recently clarified that it cannot be used to distort the statute; an agency's discretion "does not license interpretive gerrymanders" (U.S. Supreme Court, 2015b, at 2708). The Clean Air Act also regulates fuels based on their oxygen content due to additives such as ethanol (Clean Air Act, 2011). Those provisions explicitly apply to "any gasoline sold, or dispensed, to the ultimate consumer . . . or sold or dispensed directly by fuel refiners or marketers to persons who sell or dispense to ultimate consumers" (Clean Air Act, 2011). This provision demonstrates clear congressional intent to apply transportation fuels provisions to the ultimate consumer, a phrase that is conspicuously absent from the RFS. The oxygenated fuels section also contains a waiver provision. The EPA administrator, upon petition, must provide a waiver from the statutory requirements upon a finding "that there is, or is likely to be, for any area, an inadequate domestic supply of, or distribution capacity for, oxygenated gasoline" (Clean Air Act, 2011). Furthermore, "the administrator shall consider distribution capacity separately from the adequacy of domestic supply" (Clean Air Act, 2011). Congress has clearly distinguished between supply and the ultimate consumer or distribution capacity. The RFS does not apply to the ultimate consumer, arguably excluding such concerns in the waiver provision. The contrast between the provisions would seem to weigh against EPA's interpretation that its authority includes the ultimate consumer's ability to purchase renewable fuels.

Finally, there may be a bigger picture issue regarding Congressional intent for the RFS and whether EPA is making a reasonable interpretation of the waiver authority. The RFS and its statutory scheme were intended to be technology forcing on the transportation fuel industry, therefore, pushing blenders and refiners to figure out how to make use of the renewable fuels produced. EPA readily admits this in the final rule. In fact, EPA discusses how the mandated "levels were far beyond the industry's abilities at the time of EISA's enactment, strongly suggesting that Congress expected the RFS program to drive substantial market changes in a relatively short period of time" (EPA, 2015, at 29-30). EPA claims that the waiver is needed and justified because the blend wall limits the ability to supply the mandated renewable fuels to the ultimate consumer, even though it acknowledges that the statute was intended to force the industry to get beyond this limitation. EPA's justification is further complicated by its admission that the obligated parties have had plenty of time to prepare for the blend wall and that they have failed to meet congressional intent.

The test comes down to reasonableness: is EPA's interpretation reasonable under the statutory directives provided by Congress? EPA's argument appears circular, if not contradictory. It acknowledges that the statutory intent was aggressive and intended to push the industry to increase production and consumption of renewable fuels. EPA specifically notes that "if the statutory targets for 2022 were to be achieved, 18.7 billion gallons of renewable fuel would need to be consumed in 2022 either as higher level ethanol blends (E11-E85), or as non-ethanol fuels" (EPA, 2015, at 30). EPA also states that "we believe that when Congress specified the renewable fuel volume targets . . . it likely was with the understanding that the growth . . . would be well beyond any previously demonstrated ability of the industry to produce, distribute, and consume renewable fuels" (EPA, 2015, at 29). Yet, EPA argues that failure to achieve congressional intent should itself serve as justification for the waiver and reductions in the mandate. This leads EPA to the potentially unreasonable conclusion that the waiver authority trumps the clear purpose and intent of the statute.

EPA argues that the obligated parties and the biofuels industry failed to meet congressional intent, but leaves open a question about its own responsibility for the blend wall. EPA generally blames what it calls the "legal and practical constraints on the supply of ethanol to consumers" as a part of the overall blend wall problem for the RFS mandates (EPA, 2015, at 55). EPA acknowledges that "there is sufficient capacity to produce and import biofuels such as ethanol to meet the statutory applicable volume of total renewable fuel" but that "there are practical and legal constraints on the ability of sufficient volumes to be delivered to and used in transportation fuel by vehicles in the United States" (EPA, 2015, at 42). These legal constraints, however, raise potentially the most glaring question about the reasonableness of EPA's interpretation.

The Clean Air Act “makes it unlawful for any manufacturer of any fuel or fuel additive to first introduce into commerce, or increase the concentration in use of, any fuel or fuel additive . . . which is not substantially similar” to previously approved fuels (EPA, 2010). In other words, transportation fuels must be substantially similar to unleaded gasoline, which EPA has defined as having no more than 2.7% oxygen content (by weight) (Yacobucci, 2010). Upon application by manufacturers of fuels and fuel additives, EPA can waive the requirement upon proof that the fuel or fuel additive will not cause or contribute to a vehicle failing to meet emissions standards. In other words, the legal constraints that EPA points to as justification for the RFS waiver are constraints within its purview. Most consumers are limited to the purchase of gasoline with 10% ethanol blended due to this limitation. The first waiver under this provision was not issued until November 4, 2010, and was only for 15% ethanol (E15) blends in model year 2007 or newer light-duty motor vehicles (EPA, 2010). EPA subsequently expanded that waiver to model years 2001 to 2006 light-duty vehicles on January 21, 2011 (EPA, 2014). In total, these vehicles constitute 85% of the current U.S. fleet, or 195 million vehicles, but the waivers were not granted until three and four years after Congress expanded the RFS in 2007 (EPA, 2015).

Debate Continues

EPA’s final rule on the RFS invokes general waiver authority to justify reductions in the statutory mandates because of the E10 blend wall. EPA’s waiver argument raises questions under the statute and established legal precedent, including whether it is reasonable. The obligated industry has failed to make the necessary adjustments and investments to meet the statutory mandates. EPA has also taken limited and belated steps to adjust regulatory constraints. EPA’s interpretation of the waiver authority relies on the combined impacts of these constraints. Notably, these are not constraints on the renewable fuel industry’s ability to supply fuels to obligated parties but are constraints preventing consumers from purchasing and consuming more of the renewable fuels. These matters have brought the RFS mandate crashing into the blend wall and will surely weigh on the question of reasonableness. That is not to say that a court will strike down EPA’s interpretation. It is difficult to predict how a court would rule if the regulation is challenged. Deference to agencies has strong precedent. The issues presented are not clear-cut; they await the critical eyes of the judiciary where the debate is likely to continue.

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