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Questioning the Final RFS Rule, Part 1: the Rule and a Review

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The Environmental Protection Agency (EPA) recently published the final rule that establishes the volume requirements for calendar years 2014, 2015 and 2016 under the Renewable Fuel Standard (RFS). Previous articles have reviewed EPA's arguments for use of the general waiver authority in the RFS statute to lower the volume requirements contained in a leaked version of the proposed rule and the proposed rule (see *farmdoc daily* November 6, 2013, January 16, 2014, June 11, 2015 and July 10, 2015). The final rule reduces the volume requirements for renewable fuels from the statutorily-mandated levels, and EPA continues to claim that it has the authority to reduce the mandate based on specific waiver provisions in the statute. This article is the first in a three-part series that will evaluate and question the RFS waiver authority and EPA's arguments for using it to reduce the mandate in the final rule.

Background

The RFS was first created by Congress in 2005 as part of the omnibus Energy Policy Act, and it mandated that 4.0 billion gallons of renewable fuels be blended into domestic transportation fuels in 2006, with the mandate increasing to 7.5 billion gallons by 2012. As originally designed by Congress, the RFS included a general waiver provision with authority to waive the mandate in whole or in part 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." (45 U.S.C. §7545(o)(7)(A)) Congress substantially increased the RFS in 2007 with passage of the Energy Independence and Security Act of 2007 (EISA). The 2007 bill increased the RFS mandate beginning with 9.0 billion gallons in 2008 and increasing to 36 billion gallons by 2022. Congress amended the waiver provisions but only as applied to cellulosic ethanol, which had been added to the RFS.

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*. (Rule at 29, emphasis added)

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As discussed previously, the final phrase is controversial because EPA uses it to justify an additional reduction that impacts conventional biofuels such as ethanol and biodiesel. The controversy stems from the fact that 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." (Rule at 37) EPA is using the "blend wall" to reduce the RFS mandates. The blend wall is a 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 percent ethanol (E10), as opposed to higher blends such as E85 (85 percent ethanol).[1]

Discussion

Evaluating EPA's final RFS rule involves matters of Constitutional law and looks to Supreme Court precedent for guidance. The Constitutional question stems from the basic 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" and the basic questions involve whether, what and how Congress can delegate authority to the Executive. (art. 1, §1) Implementing legislation requires rules and regulations; rulemaking involves interpreting the words and the intent of Congress, which gets into policymaking.[2]

This discussion of the final RFS rule begins with the question of Congressional delegation. Did Congress provide a permissible delegation of policymaking authority to EPA? According to the Supreme Court, any review of "an agency's construction of the statute which it administers" begins with two-part question, whether: (1) "Congress has directly spoken to the precise question at issue"; or (2) "Congress has not directly addressed the precise question at issue" and "the statute is silent or ambiguous with respect to the specific issue."[3] If Congress has directly spoken and its intent is clear, then the agency must adhere to the "unambiguously expressed intent of Congress."[4] An agency's authority is limited to "a contextual commitment of authority" when Congress was clear in the statute.[5] Finally, courts are not to easily conclude that Congress delegated authority to "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[6]

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. The statute also explicitly provided waiver authority to EPA. The waiver authority at issue for this discussion is the authority that could be used when "there is an inadequate domestic supply." This appears to be a clear Congressional delegation of authority to EPA to revise the RFS volumes via the waiver. That does not end the discussion, however, because Congress explicitly limited that authority. EPA cannot revise the mandates under the waiver authority for any reason, it can only change the mandate where it has determined that there is an inadequate domestic supply. Congress did not define the phrase or any of the terms contained within it. But the phrase does place parameters on the use of the waiver authority. These explicit parameters require diving deeper into the weeds of statutory construction to determine whether EPA has properly interpreted its authority. That deeper dive will be the subject of the next two installments in this series. Specifically, it will involve trying to answer two questions about EPA's interpretation and use of the waiver authority. First, what did Congress mean by supply? Second, is EPA's interpretation a reasonable one and permissible based on previous Supreme Court decisions.

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[1] See, Randy Schnepf and Brent D. Yacobucci, "Renewable Fuel Standard (RFS): Overview and Issues," Congressional Research Service, CRS Report for Congress, R40155 (Mar. 14, 2013), at 28-30.

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (often described in terms of whether Congress "left a gap for the agency to fill" with "formulation of policy and the making of rules").

[3] See, *Chevron*, at 842-43.

[4] *Id*., at 842.

[5] See, *Whitman v. American Trucking Assn's, Inc*., 531 U.S. 457, 468 (2001) (Congress "does not, one might say, hide elephants in mouseholes").

[6] *Id*.