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## Questioning the Final RFS Rule, Part 3: Reasonableness of the Interpretation

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Today's article completes the discussion of EPA's [final rule](#) for the RFS. The previous articles in this series provided background on the RFS, a general review of the final rule and questioned EPA's definition of the word 'supply,' (*farmdoc daily* [January 7, 2016](#) and [January 14, 2016](#)). This article delves into whether EPA's interpretation in general can be considered reasonable in light of Congressional intent for the RFS.

### Discussion

Whether EPA is making a reasonable interpretation of the RFS waiver authority is a bigger picture issue regarding Congressional intent for the entire statutory scheme. The Supreme Court has explained that EPA must make a "permissible construction of the statute" that is reasonable; reasonable means the interpretation cannot go "beyond the meaning that the statute can bear."<sup>1</sup> An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."<sup>2</sup>

There appears to be no disagreement that the RFS was intended by Congress to be technology forcing on the transportation fuel industry – pushing blenders and refiners to figure out how to make use of the renewable fuels produced. EPA admits this in the final rule, stating that "Congress set ambitious volume targets as a mechanism to push renewable fuel volume growth under the RFS program" (Final RFS rule at 30). EPA goes further and the following statements in the final rule serve to highlight the point:

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<sup>1</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994).

<sup>2</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). See also, Jonathan Coppess, "[EPA Doubles Down on Questionable Reading of the RFS Statute](#)," *farmdoc daily* (5):108, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, June 11, 2015.

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- 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” (Final RFS Rule at 30);
- in 2007, the projects were that “17.3 billion gallons of ethanol was the maximum that could be consumed in 2022 if all gasoline contained E10 and there was no E0, E15 or E85” meaning “it is highly unlikely that Congress expected the very high volumes that it specified in the statute to be reached only through the consumption of E10; indeed the statute does not explicitly require the use of ethanol at all” and 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” (Final RFS Rule at 30);
- “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” (Final RFS Rule at 29).

EPA also acknowledges that the obligated parties have had plenty of time to prepare for the blend wall and that they have failed to meet Congressional intent. EPA claims, however, that the waiver is needed and justified because the E10 blend wall currently (i.e., 2014, 2015, and 2016) limits what is available to the ultimate consumer.

As discussed above, the test comes down to reasonableness: is EPA’s interpretation reasonable under the statutory directives provided by Congress? EPA’s argument circles around that understanding of Congressional intent but returns time and again to the conclusion that failure to achieve Congressional intent should itself serve as justification for the waiver and reductions in the mandate. For example, EPA concludes that if “parties engaged in these activities fail to adjust those activities to allow the statutory volume targets to be met, we believe the result is an inadequate domestic supply of renewable fuel that justifies granting the waiver” (Final RFS Rule at 52). That conclusion in light of the Congressional intent raises the question of reasonableness.

The question of reasonableness goes further, however, because EPA also relies upon the “practical and legal constraints affecting the volume of qualifying renewable fuel supplied to the ultimate consumer” even though “there is sufficient capacity to produce and import biofuels such as ethanol to meet the statutory applicable volume of total renewable fuel” (Final RFS Rule at 42). These legal constraints have helped build the blend wall that EPA argues justifies the waiver. This raises 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.<sup>1</sup> Transportation fuels must be substantially similar to unleaded gasoline, which EPA has defined as having no more than 2.7 percent oxygen content (by weight).<sup>2</sup> Manufacturers of fuels and fuel additives must apply to EPA for a waiver and provide proof that the fuel or fuel additive will not cause or contribute to a vehicle failing to meet emissions standards. The legal constraints that EPA points to as justification for the RFS waiver are matters within its control. In other words, whether consumers can purchase gasoline with more than 10 percent ethanol is largely up to EPA. The first waiver under this provision was not issued until [November 4, 2010](#), and was only for 15 percent ethanol (E15) blends in model year 2007 or newer light-duty motor vehicles. EPA subsequently expanded that waiver to model years 2001 to 2006 light-duty vehicles on [January 21, 2011](#). These vehicles constitute 85 percent 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 (Final RFS Rule at 87-88). While not given much treatment in the final rule, this issue might well weigh heavily in any court’s review of the reasonableness of EPA’s interpretation.

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<sup>1</sup> Environmental Protection Agency, “Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of Administrator; Notice,” Fed. Reg., vol 75, No. 213 (Nov. 4, 2010), at 68098.

<sup>2</sup> See, Brent D. Yacobucci, “Intermediate-Level Blends of Ethanol in Gasoline, and the Ethanol ‘Blend Wall,’” Congressional Research Service, CRS Report for Congress, R40445 (Oct. 18, 2010), at 6.

## Conclusion

Congress intended to push growth in the renewable fuels industry through ambitious statutory mandates to help clear technological, market and legal hurdles, such as the E10 blend wall. To date, the obligated industry has not made the necessary adjustments and investments to meet the statutory mandates and EPA has taken limited and belated steps to adjust regulatory constraints.

EPA's final rule invokes the general waiver authority in the statute to justify reducing the mandate for 2014, 2015, and 2016, because of this general failure to clear the E10 blend wall. Specifically, EPA's waiver argument relies on an interpretation that the phrase 'inadequate domestic supply' includes matters of consumption at the retail level. Questions about this interpretation stem from the fact that these constraints prevent consumers from purchasing more of the renewable fuels but are not constraints on the renewable fuel industry's ability to supply fuels to obligated parties. The question for a court, then, likely comes down to whether EPA can use the E10 blend wall to lower the mandate and subjugate Congressional intent to the efforts of the very industry it sought to push, as well as EPA's own regulatory decisions. It is difficult to predict how a court would rule because deference to agencies has strong precedent; resolution of the RFS appears further down the road.

## References

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