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EPA Authority to Reduce the RFS

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A recent *farmdoc daily* post exploring options for the Renewable Fuel Standard (RFS) raised a question about the Environmental Protection Agency's (EPA) authority to reduce the RFS requirements below what Congress mandated. Recently, an EPA draft of a proposed rule for the 2014 calendar year fuel supply was leaked and seems very likely to put that issue to the test. It is important to keep in mind, however, that the leaked document is the summary of a draft of EPA's proposal – it is not the final proposal nor is it the final rule. This post examines EPA's authority to reduce the RFS statutory mandates.

Background

Congress updated the RFS in 2007 establishing yearly requirements for blending renewable fuels into the domestic fuel supply that increase each year up to 36 billion gallons in 2022. For 2014, the mandate is for 18.15 billion gallons of renewable fuel. Renewable fuel is defined as all fuels produced from renewable biomass, and advanced biofuel is a subset of renewable fuel. Cellulosic biofuel and biomass-based diesel are subsets of advanced biofuel. Within the annual renewable fuel requirements are increasing annual sub-requirements for cellulosic and advanced biofuel, and for biomass-based diesel. Conventional corn-based ethanol makes up the difference between the advanced biofuel requirement and the overall renewable fuel requirement. For 2014, the statutory mandate for corn ethanol equals 14.4 billion gallons.

The statute provides EPA with the authority to waive a requirement for an individual calendar year by "reducing the national quantity of renewable fuel required." The RFS is housed in the Clean Air Act (42 U.S.C. 7545(o) and is available here; the waiver authority is in paragraph (7). Waiver may be granted because a State or a person subject to the requirements requests it. The EPA Administrator may also take the initiative and reduce the RFS requirements. To grant a waiver and reduce the requirement, EPA must determine either that implementing the requirements would "severely harm the economy or environment" or that there is "an inadequate domestic supply." EPA is to consult with the Secretaries of Agriculture and Energy on the decision, which presumably would take place before a rule is available for public review and comment under standard rulemaking procedures.

In addition to an EPA decision to reduce the RFS under waiver authority, Congress explicitly required EPA to reduce the applicable volume of cellulosic biofuel in any year that EPA determines the projected volume will be less than the volume required. If EPA reduces the cellulosic biofuel requirement, the Administrator may – but is not required to – reduce the required amount of overall renewable fuel and

advanced biofuel but only by an amount that is the same or less than the cellulosic reduction.

The leaked draft projects that substantially less cellulosic ethanol will be produced in 2014 than required by the RFS. Accordingly, EPA must reduce the cellulosic biofuel requirement and proposes to do so by 1.52 billion gallons. Because it is reducing the cellulosic requirement, EPA is permitted to also reduce the renewable fuel and the advanced biofuel requirements but by no more than the amount of the cellulosic reduction. The leaked draft indicates, however, that EPA intends to reduce the renewable fuel requirement even further, specifically dropping the requirement for conventional corn ethanol by 1.4 billion gallons to 13 billion gallons. This further reduction raises questions about EPA's authority under the statute.

Analysis

Without finding harm to the economy or the environment from the RFS, EPA can only reduce the statutory requirements based on a determination that there is "an inadequate domestic supply." In the leaked draft, EPA justifies the reduction on concerns with domestic supply that are the result of the expected limits on the amount of ethanol that can be consumed at current gasoline blend rates of predominantly 10 percent ethanol. This is commonly referred to as the "blend wall" (more on the blend wall is available here and here). The statute does not mention the blend wall, but EPA concludes that the blend wall's structural limits on the volume of renewable fuel that can be available to consumers qualifies as an inadequate domestic supply.

Two recent cases before the Federal court of appeals in Washington D.C. have involved the RFS by addressing EPA's authority for setting the requirements and for making reductions based on the waiver provisions. In *National Petrochemical & Refiners Association v. EPA* (available here, case number 10-1070) the court upheld EPA's decision to shift some of the 2009 biomass-based diesel requirement to 2010 because of a delay in getting the rules published. In its decision, the court emphasized the fact that Congress required EPA to administer the RFS so as to increase renewable fuel production. The court relied on the specific wording of the statute, which states that "the Administrator shall . . ***ensure*** that transportation fuel . . . on an annual average basis, contains ***at least*** the applicable volume of renewable fuel" listed. (emphasis added) The court particularly noted the use of the phrase "at least" which it concluded signaled Congressional intent that production be increased and the volumes in the statute not be easily reduced.

Earlier this year, in *American Petroleum Institute v. EPA* (available here, case number 12-1139), the court disagreed with EPA's justification for setting the 2012 cellulosic biofuel requirement above actual production estimates. The court did, however, uphold EPA's decision to hold off on reducing the advanced fuels requirement along with its cellulosic reduction giving weight to EPA's determination that imports and biomass-based diesel were sufficient to satisfy the mandate. For its decision on cellulosic biofuel, EPA had argued that Congress intended the RFS to promote the growth of that industry. The court concluded that EPA had gone beyond its statutory authority because Congress treated cellulosic biofuels in a different manner. When it came to cellulosic biofuel, the court concluded, Congress had clearly signaled concerns about the industry's ability to produce enough to meet the mandate and thus required a more cautious approach. Interestingly for the current issue and discussed further below, the court rejected EPA's pro-growth justification in part because the EPA decision applied to the oil industry which had no control over cellulosic production. The court referred to this as an "asymmetry in incentives" because the burden fell on the oil industry to blend a fuel that the cellulosic industry was unable to produce, which in the court's opinion would not promote growth but act as a kind of punishment on the oil industry. In reaching its decision, the court made clear that a "broad programmatic objective cannot trump specific instructions" and that "an agency may flesh out the interstices of a technical regime" but that such "discretion does not entitle the agency to arrogate to itself purposes outside the statutory provision it is applying."

Presuming that its estimates for cellulosic production are acceptable, EPA must reduce the RFS cellulosic ethanol requirement. Because it must reduce the cellulosic requirement, EPA is within its statutory authority if it chooses to reduce the advanced and renewable requirements by the same amount or less. EPA does not have authority under the specific cellulosic reduction provisions to reduce the rest of the mandate beyond that amount.

EPA may on its own initiative, however, reduce the renewable fuels requirement for 2014 if it determines

there is an inadequate domestic supply. The U.S. Energy Information Agency (EIA) recently forecast ethanol production to equal 13.49 billion gallons and biodiesel production at 1.3 billion gallons in 2014. Additionally, the Renewable Fuels Association estimates that domestic ethanol production capacity currently exceeds 14.7 billion gallons. That information would seem to indicate that, excluding cellulosic biofuels, there appears to be sufficient domestic production of renewable fuels to supply the market and meet the mandate. All of which emphasizes the question about whether the blend wall's limit on what can be made available to consumers constitutes inadequate supply.

If EPA's proposal in the leaked document becomes the final rule, it is a safe bet legal challenges will follow in short order. There are fairly general principles that will guide a court's review of the EPA decision but they are somewhat in conflict. On EPA's side is the long-standing general principle that courts give deference to the agency's interpretation of statutes it administers. Agency decisions must be based on a permissible construction of the statute but a court generally doesn't reject the agency interpretation unless the statute or its legislative history indicates that Congress would not have agreed with the agency decision. Moreover, EPA has been given broad discretion when it comes to decisions under statutory waiver provisions in the Clean Air Act.

As noted above, the biggest factor working against EPA's position is the well-established intent of Congress for the RFS to increase production of renewable fuels by mandating increasing volumes each year. Any reduction other than one necessary due to cellulosic production shortfalls can be expected to have an uphill climb because it is going against this clear intent. The other general principles factoring against EPA's proposal are that general statutory authority cannot trump specific statutory authority and EPA cannot use its interpretation of the statute to expand its authority beyond what Congress provided. EPA's decision must be rationally connected to the facts.

The blend wall is not included in the parameters Congress gave to EPA for deciding whether to waive a requirement and reduce the mandate. Therefore, the key is just how much latitude a court will be willing to give to EPA in figuring out what counts as "inadequate domestic supply." Congressional intent looms large. Congress explicitly required 18.15 billion gallons of renewable fuel be blended in 2014 and it provided specific guidance on making reductions where the cellulosic industry is incapable of producing enough to meet the mandate. When it provided for reductions through a general waiver, however, Congress vaguely required that EPA determine there wasn't enough domestic supply. Are the blend wall's limits on what can be put into the gasoline market actually a situation where there is not enough supply?

One method for helping interpret Congressional intent is to put the waiver in context with other relevant provisions. The most obvious is the waiver based on cellulosic biofuel shortfalls, where Congress provided very clear guidance that was focused on concerns with the industry's ability to actually produce the renewable fuel, not whether that biofuel had someplace to go. Likewise, the other justification for waiver requires a situation where the mandate would create a threat to the environment or the economy. Both would appear to lend weight to the argument that a waiver should be granted only in a situation where the mandates could not be met because sufficient renewable fuel was physically unavailable in that year. For example, where production could not keep pace with the mandate or that something happened that limited production capacity or supply. Congress wanted production to increase and arguably granted waiver authority only in extraordinary circumstances. It is also notable that EPA has treated its waiver authority in that manner up this point. EPA's seemingly abrupt reversal in how it interprets its waiver authority is likely to be noticed by a court.

The bottom line question remains whether relying solely on the blend wall to justify a reduction is within a reasonable interpretation of what Congress meant by inadequate supply. One clue, or at least an interesting argument, may be found in the API decision discussed above. The court was troubled by EPA's justification because of the "asymmetry in incentives" – that forcing the oil industry to purchase fuel that could not be produced in the quantities required could not reasonably be considered a way to grow the industry or force the technology. Arguably there is a similar asymmetry at work here: the blend wall does not involve the ability of the domestic renewable fuels industry to produce and supply renewable fuel to meet the mandate. The blend wall is a limitation outside of the industry's production capabilities because it is a constraint from blending most of our fuel at 10 percent ethanol along with reduced demand for gasoline. Similar to the court's argument in the API case, using the blend wall to reduce the mandate may be "asymmetrical." The renewable fuels industry has little or no control over the blend wall and the burden of using it to reduce the mandate falls exclusively on the renewable fuels industry – the

very industry Congress was seeking to expand.

Conclusion

While it is impossible to predict how a court would rule, EPA appears to be making a novel use of its waiver authority. EPA's interpretation of what constitutes inadequate supply could be viewed as contrary to Congressional intent to increase renewable fuel production because it holds the renewable fuels industry responsible for something beyond its control (the blend wall) at a time when the industry appears capable of producing sufficient quantities to supply the liquid fuel market.