

EPA Delay On Renewable Fuel Puts Ball In Congress' Court

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On Nov. 21, 2014, the U.S. Environmental Protection Agency announced that it would further delay finalizing the 2014 Renewable Fuel Standard volumetric blending requirements until 2015. This announcement put the controversial program back in the spotlight with federal legislators, increasing the likelihood of legislative activity when Congress reconvenes in January. Meanwhile, supporters and detractors of the program were left trying to understand what this latest action means for the future of the program.

RFS Program

The RFS program was created under the Energy Policy Act of 2005 and established the first renewable fuel volume mandate in the U.S. The original RFS program required 7.5 billion gallons of renewable fuel to be blended into gasoline by 2012.

Congress then expanded the RFS program pursuant to the Energy Independence and Security Act of 2007 along the following lines:

- the RFS program was expanded to include diesel, in addition to gasoline;
- the volume of renewable fuel required to be blended into transportation fuel was increased from 9 billion gallons in 2008 to 36 billion gallons by 2022;
- new categories of renewable fuel were established and separate volume requirements for each one were set; and
- the EPA was directed to apply lifecycle greenhouse gas performance standards to ensure that each category of renewable fuel emits less greenhouse gas than the petroleum fuel it replaces.

Under the RFS program, the EPA is responsible for developing and implementing regulations to ensure that transportation fuel sold in the U.S. contains a minimum volume of renewable fuel. However, the fact is that the EPA has historically been late promulgating regulations when mandating the volume for renewable fuel to be blended with gasoline. In addition, some of the mandated volumes have been set far too high and are not reflective of market conditions, whereas other mandated volumes have been



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set too low, forcing plants to halt production or shut down. Finally, there has been fraud in the RIN program, which forced the EPA to develop a program requiring verification of production.

Missed Opportunity in 2014

Congress most recently considered reforms to the RFS program in 2013, when the House Energy and Commerce Committee initiated a series of white papers looking at different aspects of the program and then formed a working group to consider reform proposals. Those bipartisan efforts stalled and were eventually abandoned when the EPA issued its 2014 proposed rule, which would have reduced the renewable fuel volumes below statutorily required volumes. This draft proposal was met with serious concern by renewable fuel producers who had made substantial commercial investments based on the long-term requirements of the program. Conversely, refiners and other obligated parties welcomed the proposed reductions, arguing that infrastructure limitations made fulfilling the statutorily prescribed volumes impossible.

Last month, the EPA missed its deadline again. Final volume obligations are required, by law, to be released in November before the compliance year to give industry certainty as to what volumes they will be required to blend into the transportation fuel pool. In the case of biomass-based diesel, final volumes are to be released 14 months prior to the compliance year. At this point the EPA has not only punted on finalizing the 2014 regulations, but it has also missed the deadline for compliance year 2015. The EPA's failure to act leaves renewable fuel producers, refiners and other stakeholders holding the bag and pushes production and blending uncertainty at least into the summer of 2015.

Congressional Forecast for 2015

As we move toward 2015, both sides of Capitol Hill will be actively reviewing the RFS program. The landscape of Congress has shifted dramatically, with Republicans retaking control of the Senate. The Senate's Environment and Public Works Committee, which has jurisdiction over the program, will be chaired by Sen. James Inhofe, R-Okla., a long-time opponent of the program who, in light of this announcement, has already renewed his calls to reform the program. Similarly, the House Energy and Commerce Committee leadership has indicated its intentions to consider energy legislation early in 2015, and RFS reform proposals will certainly be considered.

However, reforming the RFS program will not be an easy task. Many states, particularly in the Midwest, still benefit from the increased demand on agricultural products, making the politics of this issue very complicated. As we get closer to 2016, Senate Republicans will be defending a large number of seats, many from states where the RFS program is still supported. In addition, 2016 presidential candidates will begin shifting their attention to Iowa, which has become the hotbed of support for the renewable fuels program. These factors will make outright repeal of the program unlikely and enacting significant reforms will require a delicate balance.

Judicial Forecast for 2015

The EPA's decision to propose a 2014 RFS below the statutorily mandated volumes has generated vigorous debate. For those in the ethanol industry, it is important to understand the legal objections to the EPA's proposal, not just the public policy objections, because the legal arguments may determine the outcome of the dispute and set the legal precedent that limits the agency's ability to adjust the RFS in the future.

Section 211(o)(2)(B) of the Clean Air Act expressly states the RFS mandated volume of renewable fuel to be included in gasoline: “The total for 2014 is 18.15 billion gallons.” However, Section 211(o)(7)(A)(ii) provides a “general waiver” authority under which the EPA may modify these amounts if “there is an inadequate domestic supply.”

On Nov. 29, 2013, the EPA proposed reducing the total renewable fuel volume to 15.21 billion gallons. The EPA specifically found that there was an “inadequate domestic supply” and additionally asserted that the phrase is ambiguous. According to the EPA, this ambiguity empowers the agency to consider not only the production of renewable fuels, but also “factors affecting the ability to distribute, blend, dispense and consume those renewable fuels” when assessing supply. Relying on this broader interpretation, the EPA contends that current limitations regarding the ability to incorporate ethanol fuels into gasoline for consumers (the ethanol blend wall) justify the proposed volumetric reductions.

Iowa Attorney General Thomas J. Miller submitted comments to the proposal, outlining several objections to the EPA’s interpretation of the waiver authority based on the well-known Chevron test used by the courts to assess a federal agency’s interpretation of a statute: (1) if the statute is clear, the court must enforce the law’s unambiguous language; and (2) if the statute is not clear, the agency’s interpretation must be permissible.

Miller argues that the statute unambiguously prohibits the EPA from considering the distribution capacity of blended fuel. Under Section 211(o)(7)(A)(ii), the term “supply” unambiguously refers to the “quantity of renewable fuel” required under Section 211(o)(2). Therefore, in order to reduce the RFS for total renewable fuel, the EPA must find that there is an “inadequate domestic supply” of “renewable fuel.” The term “renewable fuel” means “fuel that is produced from renewable biomass” and “used to replace or reduce the quantity of fossil fuel present in a transportation fuel.” Because this definition does not include “blended fuel,” the EPA cannot consider the distribution capacity of blended fuel when assessing the adequacy of the “supply.” This interpretation is buttressed by the fact that the term “distribution capacity” is expressly included in other parts of Section 211, as well as legislative history demonstrating that the Senate removed the term “distribution capacity” from the legislation.

To the point, Miller further argues the EPA’s interpretation is not permissible. The purpose of enacting the RFS is “to move the United States towards greater energy independence and security” and “to increase the production of clean renewable fuels.” The statutory RFS achieves these objectives by incrementally increasing renewable fuel volumes so that the fuel industry may adapt. By lowering the RFS due to distribution capacity rather than supply, the EPA manipulates this framework and undermines the statutory objective of changing the country’s fuel composition.

Anticipating the objections to its interpretation of the waiver authority, the EPA provided preemptive counterarguments. The agency disputes that “supply” modifies only the renewable fuel categories in Section 211(o)(2) and asserts that the word “is best understood in terms of the person or place using the product.” Accordingly, the EPA contends that it may consider factors that affect the “supply” of renewable fuel before it reaches “consumers.” The EPA distinguishes other subsections of the statute that include a mandate to consider “distribution capacity” and argues these provisions highlight the ambiguity in Section 211(o)(7)(A)(ii). The EPA also dismisses the legislative history of Section 211(o)(7)(A)(ii) as having minimal “interpretative value” because there is no explanation accompanying the Senate’s alteration of the operative provisions during the legislative process.

Although the 2014 RFS rule has been further delayed, it is possible that the EPA’s authority to alter the statutorily mandated renewable fuel volumes will be disputed in the future. Other aspects, such as the

advanced biofuels mandate, are also generating serious legal and public policy pushback. Given that the EPA's critics have solid legal arguments, the final rule may prompt a judicial response that impacts the agency's discretion when setting renewable fuel volumes in the future.

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